In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-831

WARDEN, LEWISBURG PENITENTIARY, PETITIONER

v.

BENIGNO MARRERO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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DOCKET ENTRIES

DATE 1972	PROCEEDINGS
Feb. 24,	1. PETITION—for writ of Habeas Corpus w/affidavit to proceed in forma pauperis.
Feb. 24,	2. ORDER—It is ordered that Marrero be permitted to prosecute this action in forma pauperis. It is further ordered that Rule is hereby granted upon the respondent, Noah Alldredge, to show cause why the petition should not be granted. Rule returnable March 8, 1972. (N) (Copies to: Petitioner; Alldredge; U.S. Attorney and Atty. Jordan.)
Feb. 24,	3. MOTION—to admit Counsel (Batchelder & Witmeyer) *pro hoc vice* for the relator in this action, for all purposes. Motion signed by Richard Jordan, atty. for service of papers.
Feb. 24,	4. MEMORANDUM—of Law in Support of Petition for Writ of Habeas Corpus.
Mar. 8,	5. RESPONSE—from the Respondent, Asst. US Attorney Nagle to the rule to show cause, with Certificate of Service attached thereto.
Mar. 17,	6. REPLY MEMORANDUM OF LAW filed by respondent, with certificate of service attached thereto.
June 30,	7. LETTER—from Atty. J. J. Witmeyer III dated June 28, 1972 addressed to Judge Nealon. (Xerox copy to Asst. U.S. Atty Nagle)
July 6,	8. ORDER—Now, July 6, 1972, it is Ordered that the parties submit to the Court within ten (10) days Memoranda of Law addressed to the following issue:

1972		PROCEEDINGS
		(1) Whether habeas corpus is the proper remedy to determine petitioner's parole eligibility. (N). (Copies to: Petitioner; Respondent; Atty. Jordan and Asst. U.S. Atty. Nagle.)
July 14,	9.	MEMORANDUM OF LAW—from Relator and, CERTIFICATE OF SERVICE—upon Asst. U.S. Atty. Nagle.
July 17,	10.	MEMORANDUM OF LAW—from Asst. U.S. Atty. Nagle and, CERTIFICATE OF SERVICE—upon Atty. Witmeyer & Atty. Jordan.
July 19,	11.	LETTER—dtd. July 18, 1972 from Asst. U.S. Atty. Nagle to Judge Nealon with copies to Atty. Witmeyer & Atty. Jordan.
July 20,	12.	SUPPLEMENTAL MEMORANDUM OF LAW—from Relator and, CERTIFICATE OF SERVICE—upon Asst. U. S. Atty. Nagle.
July 24,	13.	LETTER—fr Atty. J. J. Witmeyer III Dated July 20, 1972, addressed to Judge Nealon, and, CERTIFICATE OF SERVICE—upon Asst. U.S. Atty. Nagle.
July 26,	14.	MEMORANDUM— and, ORDER—This 26th day of July, 1972, in accordance with the memorandum this day filed, the petition of Benigno Marrero for a Writ of Habeas Corpus is denied. (N). (Copies to: Petitioner; Respondent; Atty. Jordan; Atty. Batchelder, Jr.; Atty. Witmeyer; and U.S. Asst. Atty. Nagle.)

1972		PROCEEDINGS
Aug. 3,	15.	NOTICE OF APPEAL—filed by petitioner. and, CERTIFICATE OF SERVICE—upon Asst. U.S. Atty. Nagle. (Copy to: Clerk, Court of Appeals.)
Aug. 7,		RECORD ON APPEAL—mailed to U.S. Court of Appeals.
Aug. 9,	16.	RECEIPT—for Record on Appeal received from Court of Appeals.
Sept. 14,	17.	Received letter from T. F. Quinn, Clerk, CCA, advising that HC 1435 was docketed in that court at No. 72-1842, filed 9-12-72.
1973		
Sept. 7,	18.	OPINION—of the Court of Appeal filed 8-27-73 stating "The judgment of the district court will be reversed and the case remanded for the entry of judgment granting the writ of habeas corpus with the direction that Marrero be released if he is not considered for parole within 60 days."
Oct. 3,	19.	JUDGMENT—Certified copy of Judgment of Court of Appeals reversing and the cause is remanded to said District Court with directions to enter judgment granting the writ of habeas corpus with the direction that Marrero be released if he is not considered for parole within sixty days in accordance with the opinion of this Court. (Gibbons & Rosenn, Circuit Judges)
Oct. 3,		Case file received from CCA 10-3-73 and returned to our files. Receipt was acknowledged of having received the records.
Oct. 23,	20.	ORDER—Now, this 23rd day of October, 1973, in accordance with the judgment ordered by the Third Circuit Court of Appeals on August 27, 1973, it is hereby ordered that a writ of habeas corpus is granted and that petitioner shall be re-

leased from custody by respondent within sixty (60) days from the date of the judgment if he is considered for parole by the expiration of those sixty (60) days. (N). (Copy to: Petitioner; Respondent; Harry C. Batchelder, Jr., Esq.; Richard Jordan, Esq.; Harry A. Nagle; and John J. Whitmeyer, III, Esq.)

Oct. 25, 21. CORRECTED ORDER—Now, this 25th day of October, 1973, in accordance with the judgment ordered by the Third Circuit Court of Appeals on August 27, 1973, it is hereby ordered that a writ of habeas corpus is granted and that petitioner shall be released from custody by respondent within sixty (60) days from the date of the judgment if he is *not* considered for parole by the expiration of those sixty (60) days. (N). (Copy to: Petitioner; Respondent; Harry C. Batchelder; Richard Jordan, Esq.; Harry A. Nagle; and J. J. Whitmeyer, III, Esq. and C.C.A.)

Oct. 30, 22. COPY OF SUPREME COURT ORDER—dated 10-25-73—Upon consideration of the application for the petitioner (Warden) and the opposition filed thereto,

It is ordered that the mandate of the U. S. Court of Appeals for the Third Circuit in case No. 72-1842 be, and the same is hereby, stayed pending the timely filing of a petition for a writ of certiorari in the above-entitled cause. Should such a petition be so timely filed, this stay is to remain in effect pending this Court's action on the petition. If the petition for a writ of certiorari is denied, this stay is to terminate automatically. In the event the petition for a

writ of certiorari is granted, this stay is to continue pending the sending down of the judgment of this Court.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Ct.

Copy handed to Judge Nealon.

Case file to Judge Nealon 1-4-74 Per F. K.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA EX REL. BENIGNO MARRERO, No. 69792-158, -against- WARDEN, LEWISBURG PENITENTIARY, RESPONDENT.	PETITION FOR WRIT OF HABEAS CORPUS No. 1435

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA:

Relator, BENIGNO MARRERO, prays that a writ of habeas corpus directed to the Warden of Lewisburg Penitentiary issue, and alleges:

1. He is unlawfully detained by the Warden of Lewisburg Penitentiary in Lewisburg Penitentiary, County of Northumberland, State of Pennsylvania.

2. He is detained pursuant to a pretended order of commitment issued by the United States District Court for the Southern District of New York.

3. His indictment, No. 70 Cr. 161, for the offenses for which he has been confined was filed on March 9, 1970. He pleaded not guilty, but was found guilty by a jury, on April 10, 1970, of violating 21 U.S.C. §§ 173 and 174 and 26 U.S.C. §§ 4701, 4703, 4704(a), 4771(b) and 7237(a). He was sentenced on May 27, 1970, pursuant to those sections and received a sentence of confinement for ten years.

4. He appealed from the judgment of conviction. His conviction was affirmed by the United States Court of Appeals for the Second Circuit on October 26, 1971. An opinion, not yet reported, was rendered by that court. *United States v. Marrero,* No. 71-008.

5. He has petitioned the United States Supreme Court for a writ of certiorari to review the judgment of the Second Circuit. *Marrero v. United States,* No. 71-5725.

6. At his arraignment, plea, trial, and sentencing, petitioner was represented by an attorney, Joseph J. Stone, Esq., who address is 277 Broadway, Room 1108, New York, New York 10007.

7. On his appeal and petition for certiorari, petitioner was represented by an attorney, Harry C. Batchelder, Jr., whose address is 20 Broad Street, New York, New York 10005.

8. If 18 U.S.C. § 4202 applied to him, petitioner would be eligible for parole in or about September of 1973.

9. He is being held in custody unlawfully in that 26 U.S.C. § 7237(d), which was in effect at the time of his sentencing, provided that he would never be eligible for parole. That section was fully repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, according to *United States v. Stephens*, No. 71-1884 (9th Cir., Sept. 29, 1971), and thus the provisions of 18 U.S.C. § 4202 are applicable to him. Because the question of eligibility for parole, even in the future, is a question of status, he is entitled to have that question determined on petition for a writ of habeas corpus.

10. No previous petition for habeas corpus, no motion for relief under 28 U.S.C. § 2255, and no other application, petition, or motion has been filed seeking this relief.

11. Relief under 28 U.S.C. § 2255 was not sought because that provision does not apply to requests for the type of relief sought here. Section 2255 requires that immediate release from confinement be sought. Such relief is not being requested here. Section 2255 also applies only to test sentence. The imposed sentence has not been called into question here.

12. He is without funds sufficient to pay the costs of this action, as shown by the attached affidavit. He therefore requests leave to proceed *in forma pauperis*.

/s/ Benigno Marrero
BENIGNO MARRERO

HARRY C. BATCHELDER, JR.
Attorney for Relator
20 Broad Street
New York, New York 10005
Tel.: (212) 422-6767

Address for service of papers:
RICHARD JORDAN, ESQ.
431-432 Connell Bldg.
Scranton, Pa. 18503

Of Counsel:
JOHN J. WITMEYER III

VERIFICATION

STATE OF PENNSYLVANIA
COUNTY OF NORTHUMBERLAND } ss.:

BENIGNO MARRERO, being first duly sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Benigno Marrero
BENIGNO MARRERO

Subscribed and sworn to before me this 17 day of Jan., 1972.

/s/ S. A. LACATTUSI

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA ex rel. BENIGNO MARRERO, No. 69792-158,	Forma Pauperis Affidavit
-against-	
WARDEN, LEWISBURG PENITENTIARY, RESPONDENT.	Civil Action No.

I, BENIGNO MARRERO, do hereby swear that I am a citizen of the United States of America; that because of my poverty I am unable to pay the costs of said suit or action; that I am unable to give security for the same; and that I believe I am entitled to the redress I seek in said suit or action.

/s/ Benigno Marrero
BENIGNO MARRERO

STATE OF PENNSYLVANIA
COUNTY OF NORTHUMBERLAND } ss.:

BENIGNO MARRERO, being first sworn under oath presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Benigno Marrero
BENIGNO MARRERO

Subscribed and Sworn to before me this 17 day of Jan., 1972.

/s/ S. A. Lacattusi
Notary Public

My commission expires _____

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA EX REL. BENIGNO MARRERO, No. 69792-158,	Habeas Corpus No. 1435
v.	
WARDEN, LEWISBURG PENITENTIARY,	

ORDER

Now, February 24, 1972, upon consideration of the petition for a writ of habeas corpus filed in this case, it is Ordered that Benigno Marrero be permitted to prosecute this action in forma pauperis without the prepayment of fees or costs.

It is further ordered that Rule is hereby granted upon the respondent, Noah Alldredge, to show cause why the petition should not be granted.

Rule returnable March 8, 1972.

/s/ William J. Nealon
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA ex rel. BENIGNO MARRERO, RELATOR, -against- WARDEN, LEWISBURG PENITENTIARY, RESPONDENT.	Habeas Corpus No. 1435

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the United States of America proceeding on relation of Benigno Marrero, Relator, hereby appeals to the United States Court of Appeals for the Third Circuit from the order denying relator's petition for habeas corpus entered in this action on July 26, 1972.

Dated: New York, New York,
July 28, 1972

/s/ Harry C. Batchelder, Jr.
HARRY C. BATCHELDER, JR.
Attorney for Relator
428½ Clinton Street
Brooklyn, New York 11231

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1842

UNITED STATES OF AMERICA
ex rel BENIGNO MARRERO,
APPELLANT

v.

WARDEN, LEWISBURG PENITENTIARY,
APPELLEE

ORDER

Upon application of the appellee in the above-entitled matter, the motion to enlarge and extend the time within which appellee may file a petition for rehearing to October 1, 1973 is granted and the mandate will be stayed until final disposition of the petition for rehearing.

/s/ Max Rosenn
Circuit Judge

Dated: September 14, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1842

UNITED STATES OF AMERICA
ex rel. BENIGNO MARRERO,
APPELLANT

v.

WARDEN, LEWISBURG PENITENTIARY

PRESENT: GIBBONS and ROSENN, *Circuit Judges*
Order Sur Petition
for Recall and Stay of Mandate

We filed our opinion and entered judgment in this matter on August 27, 1973. On September 14, 1973, we granted appellee's motion to stay the issuance of the mandate until October 1, 1973, so that it could determine in the meantime whether or not to apply to this court for rehearing. No such application was filed and on October 2, 1973, our certified judgment in lieu of formal mandate issued. We now have before us appellee's petition, belatedly filed October 16, 1973, to recall and stay the mandate pending the filing and disposition of a petition for certiorari to the Supreme Court of the United States. No extraordinary circumstances are assigned in the petition for failure to comply timely with Rule 41 of the Federal Rules of Appellate Procedure. Also see Rule 23(c) F.R.A.P.

It is therefore ORDERED that the appellee's petition for recall and stay of mandate be and is hereby denied.

By the court:

Circuit Judge

Dated:
October 23, 1973

Supreme Court of the United States

No. A-420

WARDEN, LEWISBURG PENITENTIARY,
PETITIONER,

v.

BENIGNO MARRERO

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner, and the opposition filed thereto,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Third Circuit in Case No. 72-1842 be, and the same is hereby, stayed pending the timely filing of a petition for a writ of certiorari in the above-entitled cause. Should such a petition be so timely filed, this stay is to remain in effect pending this Court's action on the petition. If the petition for a writ of certiorari is denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue pending the sending down of the judgment of this Court.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 25th day of October, 1973.

Supreme Court of the United States

No. 73-831

WARDEN, LEWISBURG PENITENTIARY,
PETITIONER,

v.

BENIGNO MARRERO

ORDER ALLOWING CERTIORARI. Filed January 7, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

The Solicitor General is invited to file a response to the motion of respondent for leave to proceed in forma pauperis on or before January 16, 1974.

☆ U.S. Government Printing Office: 1974—530-897/155

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

WARDEN, LEWISBURG PENITENTIARY, PETITIONER

v.

BENIGNO MARRERO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Warden of Lewisburg Penitentiary, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*), and the Memorandum and Order of the United States District Court for the Middle District of Pennsylvania (App. C, *infra*) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on August 27, 1973. On October 25, 1973, Mr. Justice Brennan granted a stay of man-

date pending timely filing of a petition for a writ of certiorari, and continuing thereafter until this Court determines this matter. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision in 26 U.S.C. (1964 ed.) 7237 (d) that certain narcotics offenders are not eligible for parole under 18 U.S.C. 4202 survives the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, so that a narcotics offender who committed his offenses before the effective date of the new statute may not be considered for parole although he has completed service of more than one-third of his sentence.

STATUTES INVOLVED

Section 7237 of the Narcotic Control Act of 1956, 70 Stat. 568, as amended, 26 U.S.C. (1964 ed. and Supp. V) 7237, provided in pertinent part:

> (a) Where no specific penalty is otherwise provided.
>
> Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be impris-

oned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

* * * * *

(d) No suspension of sentence; no probation; etc. Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24–201 and following), as amended, shall not apply [Repealed, effective May 1, 1971, § 1101(b)(4)(A), Pub. L. 91–513, 84 Stat. 1292; § 1105(a), Pub. L. 91–513, 84 Stat. 1295].

SEC. 1103(a) Prosecutions for any violation Prevention and Control Act of 1970, Pub. L. 91–513, 84 Stat. 1294, provides in pertinent part:

> SEC. 1103(a) Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section * * *, or abated by reason thereof.

Section 109 of the Act of July 30, 1947, 61 Stat. 635, 1 U.S.C. 109, provides in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability * * *.

The general parole statute, 18 U.S.C. 4202, provides as follows:

> § 4202. Prisoners eligible.
>
> A Federal prisoner, other than a juvenile delinquent or a committeed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years. (June 25, 1948, ch. 645, 62 Stat. 854; July 31, 1951, ch. 277, 65 Stat. 150.)

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on a two count indictment of having received, facilitated the transportation of, and concealed heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174 (count 1) and of having purchased, dispensed and distributed cocaine not in or from its original stamped package, in violation of 26 U.S.C. (1964 ed.) 4701, 4703, 4704(a), 4771(b), and 7237(a) (count 2). On May 27,

1970 (before the May 1, 1971, effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970), he was sentenced as a second offender to concurrent terms of ten years' imprisonment on each count. The court of appeals affirmed (450 F. 2d 373 (C.A. 2)), and this Court denied certiorari, 405 U.S. 933. Marrero is now serving that sentence in the federal penitentiary at Lewisburg, Pennsylvania.

2. On February 24, 1972, Marrero filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. He claimed that since the statute in effect at the time of his sentencing (26 U.S.C. (Supp. V, 1964 ed.) 7237(d))—under which he was ineligible for parole under 18 U.S.C. 4202—was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, he should be eligible for parole under 18 U.S.C. 4202 in September 1973, when one-third of his sentence had been served.[1] The district court held that the 1970 statute did not repeal the prohibition on parole eligibility in the prior statute, on the ground that such prohibition was a penalty whose existence was continued by the specific savings provisions of Section 1103(a) of the 1970 statute and the Act of July 30, 1947 (1 U.S.C. 109) (App. C, *infra*). The Court of Appeals for the Third Circuit reversed, holding that the 1970

[1] Marrero actually became eligible for parole on June 20, 1973, if 18 U.S.C. 4202 is applicable to him. Neither court below considered whether habeas corpus relief was appropriate before that date, a question that now appears to be moot.

statute had repealed the prohibition on parole eligibility in the prior act (App. A, *infra*). It granted the writ and directed that Marrero be released unless he were considered for parole within 60 days. The mandate has been stayed pending this Court's determination.

REASONS FOR GRANTING THE WRIT

In *Bradley* v. *United States*, 410 U.S. 605, this Court held that 26 U.S.C. (1964 ed.) 7237(d) survives the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970 so as to prohibit suspended sentences, probation, and parole under 18 U.S.C. 4208(a) for narcotics sellers who committed their offenses before the effective date of the new statute. The majority did not reach the question at issue here—whether such offenders are eligible for parole under the general parole statute, 18 U.S.C. 4202—since it did not believe that question was yet ripe for review on the facts of that case.[2] Two members of this Court did reach that question and concluded that parole under Section 4202 was also unavailable.[3]

---

[2] 18 U.S.C. 4208(a) permits the judge at sentencing to specify a minimum term after which the defendant shall become eligible for parole. If no such designation is made, the general parole statute, 18 U.S.C. 4202, provides that a federal prisoner is eligible for parole after he has served one-third of his sentence. Under both statutes, the Parole Board must, when the prisoner becomes eligible, determine whether or not to place him on parole.

[3] Mr. Justice Brennan and Mr. Justice White filed a separate statement, 410 U.S. at 611–612, in which they declared:

> * * * [T]hey are also of the view that § 1103(a) [the specific savings clause of the 1970 Act] forecloses the avail-

Since Marrero seeks a determination that he is now eligible for parole under 18 U.S.C. 4202, the issue reserved in *Bradley* is now ripe for resolution by this Court. The courts of appeals are in conflict on the issue,[4] and an authoritative resolution of the conflict by this Court is necessary.

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ability of parole under both 18 U.S.C. § 4202 and 18 U.S.C. § 4208(a), and that even if this were debatable as to § 4202, that the general saving statute, 1 U.S.C. § 109 clearly mandates that conclusion as to that section. * * *

[4] The Fourth, Fifth, and District of Columbia Circuits agree with the court below. See *Alcarado* v. *McLaughlin*, No. 73–1111 (C.A. 4; decided October 23, 1973); *Amaya* v. *Board of Parole*, No. 72–3142 (C.A. 5; decided November 9, 1973); and *United States* v. *Marshall*, No. 71–1801 (C.A.D.C.; decided September 12, 1973). The Tenth Circuit has held that the Board of Parole is without authority to consider parole for such prisoners. *Perea* v. *United States Board of Parole*, 480 F. 2d 608.

The Ninth Circuit, before *Bradley*, had held that those sentenced before the effective date of the new act did not become eligible for parole by virtue of the passage of that act. *Noriega-Arjona* v. *U.S. Bureau of Prisons*, 464 F. 2d 561. A panel of the Second Circuit, in *United States* v. *Huguet*, 481 F. 2d 888, 891 noted that another panel had previously indicated that parole would not be available under Section 4202 for offenses committed under the old act (*United States* v. *DeSimone*, 468 F. 2d 1196), but stated that, after the *Bradley* decision, "previous expressions of ours on this subject cannot be regarded as controlling." The question at issue here must therefore now be considered open in the Second Circuit. Similarly, although the First Circuit's decision in *Bradley* (455 F. 2d 1181) did not distinguish between parole under Sections 4208(a) and 4202, but simply held parole unavailable, the question must be considered open in the First Circuit in light of this Court's conclusion in its *Bradley* decision that the issue of parole under Section 4202 had not been properly before the court of appeals.

Before *Bradley*, the Seventh Circuit stated in *United States* v. *McGarr*, 461 F.2d 1, that the parole ineligibility provisions of the old act were repealed by the new act.

This conflict creates a serious problem for the Bureau of Prisons and the Board of Parole. Currently, the parole eligibility of narcotics offenders incarcerated for violations of the Narcotic Control Act of 1956 varies depending on the circuit in which they were sentenced (see *Bradley, supra,* 410 U.S. at 610, n. 5) or in which they are confined.[4a] It is obviously unjust to have eligibility for parole turn on the fortuitous circumstance of the place of confinement, with prisoners at Leavenworth (in the Tenth Circuit) ineligible, while those at Lewisburg (Third Circuit) or Atlanta (Fifth Circuit) are considered for parole.

Neither the Bureau nor the Board would object to considering all such offenders eligible for parole under 18 U.S.C. 4202, since the grant of parole reflects a determination that supervised release from confinement is in the interests of both the prisoner and society;[5] however, these agencies are obliged to execute the will of Congress, and it appears to them that they do not have the authority to consider paroling such offenders, for the reasons explained at length in our brief in *Bradley*[6] and summarized herein.

1. Section 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 provides that "prosecutions" for violations occurring under the old act are not to be affected. *Bradley* establishes that such "prosecutions" include sentencing, and thus that

[4a] The Board of Parole has changed the policy noted in *Bradley*. It now treats all prisoners in Marrero's position as ineligible for parole (in the absence of an unstayed court order requiring different treatment).

[5] Obviously, a holding in favor of parole eligibility does not require the *release* of any prisoner on parole.

[6] We are sending a copy of our brief in *Bradley* to respondent.

the prohibition in 26 U.S.C. 7237(d) on suspended sentences, probation, and judicially designated parole eligibility under 18 U.S.C. 4208(a) survived the new act. Under the standards established in *Bradley,* eligibility for parole under 18 U.S.C. 4202 would also appear to be part of the sentence and thus of the "prosecution".

The Court in *Bradley* reasoned that parole eligibility under 18 U.S.C. 4208(a) is part of the sentencing process because the decision as to when an offender will become eligible for parole is, under that section, made by the judge at the time of sentencing (410 U.S. at 610–611). Viewed pragmatically, the decision as to when an offender will become eligible for parole under 18 U.S.C. 4202 is also made by the judge at the time of sentencing. To be sure, under Section 4208(a) the decision is made explicitly as part of the sentence, while, when Section 4202 applies, the decision is made implicitly by fixing the length of the sentence. Nevertheless, since judges are well aware of the provisions of Section 4202, an offender's eligibility for parole upon the expiration of one-third of his sentence is undoubtedly a factor which is ordinarily considered in imposing sentence.[7] Thus, the time when the offender becomes eligible for parole, whether under Section 4208(a) or under Section 4202, is a decision made by the trial judge

[7] Marrero could have been sentenced to as much as forty years' imprisonment under count 1 (21 U.S.C. 174) and twenty years' imprisonment under count 2 (see 26 U.S.C. 7237(a)). Although it is not possible to determine what sentence the trial judge would have imposed had he believed that Marrero might be eligible for parole under Section 4202, it is at least clear that the judge in imposing sentence did not contemplate Marrero's release after little more than three years.

at sentencing, and thus, under the teaching of *Bradley*, part of the prosecution saved by Section 1103.

The court below interpreted *Bradley* as concluding that the "parole eligibility decision" under Section 4202 is not part of sentencing (and therefore not included in the "prosecution" saved by Section 1103) because the decision to *grant* parole is not made until "long after sentence has been entered and the prosecution terminated." (App. A, *infra*, p. 11a).[8] Realistically, however, parole under Section 4202 is no different from parole under Section 4208(a), which *Bradley* held to be part of sentencing. Under both sections, the Parole Board decides whether to grant parole when the designated minimum period of incarceration has been served, some time after sentencing. But *Bradley* indicates that this is not significant—since the decision concerning the time at which an offender will become *eligible* for parole is made by the trial judge at sentencing under both sections, parole eligibility under both sections is part of the sentence, and thus of the prosecution.[9]

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[8] We do not believe that the Court in *Bradley*, which "express[ed] no opinion" on the "rather different matter" of Section 4202 parole (410 U.S. at 611), meant to arrive at a definitive interpretation of the applicability of Section 1103. Rather, we think it was drawing a distinction showing the ripeness of the Section 4208 issue and the lack of ripeness of the Section 4202 issue. The question of ripeness of the Section 4202 issue and the distinction, if any, between that issue and the Section 4208 issue was not raised in the lower court proceedings in *Bradley*, nor was it briefed or argued to this Court.

[9] *Morrissey* v. *Brewer*, 408 U.S. 471, which indicates that the decision by administrative authorities to grant or deny parole is not part of the "prosecution" for purposes of the Sixth Amendment, is not inconsistent with this conclusion.

2. The general saving provision, 1 U.S.C. 109, provides that the repeal of a statute does not extinguish any penalty incurred under that statute unless expressly so provided.[10] Ineligibility for parole would appear to be a penalty under the 1956 Narcotic Control Act.[11] Although the majority in *Bradley* did not find it necessary to consider the general saving statute, Mr. Justice Brennan and Mr. Justice White in their separate statement agreed that it "clearly mandates" the

[10] 1 U.S.C. 109, originally enacted in 1871, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability * * *.

At common law, when a criminal statute was replaced by another statute or was amended to lessen punishment, the defendant was entitled to the benefit of the new act, although his offense was committed prior to the effective date thereof, unless there was a general saving statute or a specific clause in the new act. *United States* v. *Reisinger*, 128 U.S. 398; *Moorehead* v. *Hunter*, 198 F. 2d 52 (C.A. 10).

[11] Beginning with *United States* v. *Reisinger*, *supra*, the general saving statute has been held to apply to criminal laws and the punishments attached to them, and the effect has been to preserve the vitality of an amended or repealed law for purposes of both prosecuting and punishing offenses committed while the law was in effect. See *Lovely* v. *United States*, 175 F. 2d 312 (C.A. 4); *Hurwitz* v. *United States*, 53 F. 2d 552 (C.A.D.C.); *Duffel* v. *United States*, 221 F. 2d 523 (C.A.D.C.); *United States* v. *Kirby*, 176 F. 2d 101 (C.A. 2); *United States* v. *Brown*, 429 F. 2d 566 (C.A. 5); *Faubion* v. *United States*, 424 F. 2d 437 (C.A. 10); *Maceo* v. *United States*, 46 F. 2d 788 (C.A. 5); *United States* v. *Smith*, 433 F. 2d 341 (C.A. 4); *Stillman* v. *United States*, 177 F. 2d 607 (C.A. 9); *United States* v. *Carter*, 171 F. 2d 530 (C.A. 5); *United States* v. *Taylor*, 123 F. Supp. 920 (S.D.N.Y.), affirmed on opinion below, 227 F. 2d 958 (C.A. 2).

conclusion that parole is not available for offenses committed under the old act (410 U.S. at 611–612).

Our *Bradley* brief discusses in detail the basis for our conclusion that Congress intended ineligibility for parole for narcotics offenses to be a penalty under the 1956 Act, and did not intend, in enacting the 1970 repeal, to ameliorate the severity of penalties already incurred (Br. 10–19). In summary, we showed that in the Narcotics Control Act of 1956, Congress intended to discourage narcotics trafficking by imposing very severe penalties, and that ineligibility for parole was considered an important element of those penalties. See H. Rep. No. 2388, 84th Cong., 2d Sess., pp. 65, 69; S. Rep. No. 1997, 84th Cong., 2d Sess., pp. 5–6.

The 1970 Comprehensive Drug Abuse Prevention and Control Act added a rehabilitative goal to the basically punitive approach of the 1956 Act, and provided a more flexible approach for certain offenders. It retained the prohibition on probation and parole only for persons who engage "in a continuing criminal enterprise" involving narcotics violations. 21 U.S.C. 848.[12]

There is no indication that this flexibility was intended to benefit narcotics traffickers already con-

[12] If the ban on parole eligibility no longer applies to all offenses committed under the old law, the creation of this new category of non-parole-eligible offenses creates a serious dilemma: Either the Parole Board must inquire into the facts of each pre-May 1971 narcotics conviction to determine whether the offender would be eligible for parole under the standards set in the new act, or some offenders may be granted parole although they committed offenses for which parole is barred under both the old and new laws. Marrero is a second offender; the record does not disclose whether his offenses were of the type for which parole is unavailable under the new act.

victed; rather, it was intended to increase the likelihood that such persons would in the future be prosecuted and convicted, Congress having concluded that the severe penalties under the prior law impeded the prosecution and conviction of such offenders. See H. Rep. No. 91–1444 (Part 1), 91st Cong., 2d Sess., p. 11. The legislative history contains no evidence that Congress intended, by saving "prosecutions" in Section 1103 of the 1970 Act, to limit the broad effect of 1 U.S.C. 109 in saving penalties,[13] or that Congress in 1970 had any doubt that ineligibility for parole was part of the penalty under the old act which would be saved under the new one.

Even aside from the evidence of congressional intent, it seems apparent that the unavailability of parole is necessarily an integral part of the penalty for the crime. Indeed, several courts have held that it is such an important part of the penalty from the defendant's point of view that a guilty plea taken without informing the defendant of his ineligibility for parole is invalid. *Berry* v. *United States,* 412 F. 2d 189, 193 (C.A. 3); *Harris* v. *United States,* 426 F. 2d 99 (C.A. 6); *Bye* v. *United States,* 435 F. 2d 177 (C.A. 2); *Munich* v. *United States,* 337 F. 2d 356, 361 (C.A. 9) (failure to inform of ineligibility for probation or parole); *Jenkins* v. *United States,* 420 F. 2d 433, 437 (C.A. 10) (same). As the Second Circuit noted in *United States* v. *Ross,* 464 F. 2d 376, 379 (C.A. 2):

> While it is true that the granting of probation or parole does not extinguish a defendant's penal obligation, one would be hard pressed to

[13] It is significant that 1 U.S.C. 109 provides that penalties are to be saved unless the repealing statute "expressly provides" otherwise.

find a prison inmate who did not view the unavailability of parole as a penalty.

The court below avoided the effect of 1 U.S.C. 109 by concluding that it was "intended to obviate the common law's technical abatement of a prosecution by the repeal of the statute under which it proceeded. *Hamm* v. *Rock Hill,* 379 U.S. 306, 314 (1964)" (App. A, *infra,* p. 12a). It therefore concluded that the purpose of that section would not be furthered by applying it to preclude parole eligibility under Section 4202.[14] In our view, however, *Hamm* v. *Rock Hill* simply does not support this conclusion. In that opinion, this Court cited, as an example of a situation in which the general saving statute would apply to prevent a technical abatement, the case of a new statute substituting more severe penalties for those originally applicable (379 U.S. at 314). It distinguished such a situation from the one before it, in which the defendant had been convicted under state trespass statutes for peacefully sitting-in at public lunch counters. That conduct had become affirmatively protected by statute and thus transformed into a right.[15] Although, in the present case, the new statute ameliorated the penalties previ-

[14] This analysis is inconsistent with the statement of Justices Brennan and White in *Bradley;* it also finds no support in the majority opinion, which at least implies the applicability of 1 U.S.C. 109.

[15] In *Pipefitters* v. *United States,* 407 U.S. 385, this Court similarly distinguished *Hamm* as applying only where a right is substituted for a crime. Although subsequent legislation there made lawful what had been a crime, the Court held that the general saving statute left the pre-trial conduct fully punishable. Significantly, the Court reached that conclusion even after finding that there was no demonstration of specific congressional intent on this point when the new act was passed.

ously applicable rather than increasing them, Section 109 nonetheless applies to prevent abatement, since no new right has been created or recognized. Indeed, this Court has applied Section 109 to avoid abatement even when the conduct involved was no longer a crime under the new law. See *Pipefitters* v. *United States,* 407 U.S. 385 *supra; Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535, 553; *Hertz* v. *Woodman,* 218 U.S. 205; *United States* v. *Reisinger, supra.*

The offense of selling cocaine has undergone no such transmutation from prohibited crime to protected right as had the conduct in *Hamm.* Indeed, unlike the conduct in *Pipefitters, Allen, Hertz,* and *Reisinger,* respondent's conduct remained criminal under both the old and new acts; the new act simply altered the specific elements of certain offenses and changed the penalties. Both the legislative history concerning the purposes of the legislation and the inclusion of a specific saving clause apparently reflect congressional intent to let the pre-repeal law control pre-repeal violations. We submit, therefore, that the application of 1 U.S.C. 109 to this case would appear to be required.

CONCLUSION

We believe the conflicting views of the courts on the issue here involved should be resolved to avoid unequal treatment of persons on the basis of the location of the institution in which they are incarcerated. But it does not necessarily follow that plenary consideration with oral argument is warranted. Since the Court has recently had the benefit of full briefing and argument on the issues presented herein, we suggest that summary disposition may be appropriate.

526-732—73——8

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1973.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 72-1842

UNITED STATES OF AMERICA EX REL. BENIGNO MARRERO, APPELLANT

v.

WARDEN, LEWISBURG PENITENTIARY

(D. C. Habeas Corpus No. 1435)

Appeal From the United States District Court for the Middle District of Pennsylvania

Submitted May 14, 1973

Before GIBBONS and ROSENN, *Circuit Judges.*

Harry C. Batchelder, Jr., Esquire, John J. Witmeyer, III, Esquire, John B. Sherman, Esquire, for appellant, *Stewart Dalzell, Esq.,* Drinker, Biddle & Reath, Philadelphia, Pa., counsel for appellant.

S. John Cottone, Esquire, Harry A. Nagle, Esquire, for appellee.

OPINION OF THE COURT

(Filed August 27, 1973)

ROSENN, *Circuit Judge.* The major question raised by this appeal is whether a prisoner, ineligible for parole at the time he was sentenced under the provisions of the penal statute for which he was convicted, became eligible for parole when the penal

statute was subsequently repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Resolution of the question requires analysis of: (1) the proper forum in which to make such a claim of parole eligibility, (2) the nature of parole and its relation to sentencing, and (3) two congressional "saving provisions" for repealed criminal statutes.

Benigno Marrero was tried to a jury and convicted on May 27, 1970, in the United States District Court for the Southern District of New York, of possessing and selling heroin in violation of 21 U.S.C. §§ 173 and 174 and 26 U.S.C. §§ 4701, 4703, 4704(a), 4771(b), and 7237(a). As a second offender, he was sentenced to mandatory minimum terms of ten years on each of two counts, the sentences to run concurrently. His conviction was affirmed by the Second Circuit. 450 F.2d 373 (2d Cir. 1971), *cert. denied,* 405 U.S. 933 (1972). He now appeals the denial on July 26, 1972, by the United States District Court for the Middle District of Pennsylvania of his petition for writ of habeas corpus.

In his habeas petition, appellant alleged that he was being unlawfully detained because 26 U.S.C. § 7237 (d),[1] which was in effect at the time of his sentencing

[1] 26 U.S.C. § 7237(d) provided:
"Upon conviction—
"(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or
"(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,"
the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24–201 and following), as amended, shall not apply.

and precluded his parole eligibility, had been repealed effective May 1, 1971, by § 1101(b)(4)(A) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513, 84 Stat. 1292. He alleged that repeal of § 7237(d) made him eligible for parole in September 1973 under 18 U.S.C. § 4202. He did not allege that the United States Board of Parole or any other authority had decided that § 4202 would not be applied to him or that he would not be eligible for parole in September 1973, but he contended that habeas corpus is nonetheless an appropriate remedy at this time to determine his status vis-a-vis parole. We think habeas relief is merited and therefore reverse the district court's denial of relief.

I

The first question that we must address is the applicability of the exhaustion of administrative remedies doctrine. That doctrine deserves comment because appellant did not seek any relief from the Board of Parole before instituting this action.

The basic premises underlying the exhaustion requirement are that (1) judicial review may be facilitated by allowing the appropriate agency to develop a factual record and apply its expertise, (2) judicial time may be conserved because the agency might grant the relief sought, and (3) administrative autonomy requires that an agency be given an opportunity to correct its own errors. *Waddell* v. *Alldredge*, No. 72–1417 (3d Cir., filed June 29, 1973); *McKart* v. *United States*, 395 U.S. 185, 194–95 (1969).

We find none of the basic goals of the administrative exhaustion doctrine would be served in the present case were we to direct the appellant to seek relief

from the Board of Parole before judicial action. The issue here of the availability of parole under § 4202 involves only statutory construction. No administrative record or expertise is therefore required. The second and third premises above are also inapplicable because the Board of Parole has taken a firm position that § 4202 is unavailable to prisoners in appellant's situation.

Whether to require exhaustion is discretionary. If pursuing an administrative remedy would be futile, the requirement may be waived. *City Bank Farmers Trust Co.* v. *Schnader,* 291 U.S. 24, 34 (1934); *see* 3 *Davis, Administrative Law Treatise,* § 20.07, at 99 (1958). We are especially reluctant to require exhaustion when, as here, both parties agree administrative proceedings would be futile. Moreover, as appellant points out, this habeas petition was filed in January 1972, and more than 19 months have already elapsed. Subjecting him to any further unnecessary delay would be unconscionable. The unfairness in such unnecessary protraction of litigation partially underlay the Supreme Court's decision in *Peyton* v. *Rowe,* 391 U.S. 54 (1968), that a prisoner serving consecutive sentences can challenge his later sentences before beginning to serve them. 391 U.S. at 64. We therefore decline to invoke the exhaustion doctrine here.[2]

[2] In *Soyka* v. *Alldredge*, No. 72-1918 (3d Cir., filed July 10, 1973), we held that a habeas corpus petition seeking credit for time spent in custody prior to sentencing was premature pending exhaustion of administrative remedies. The petitioner claimed that he was legally entitled to credit under 18 U.S.C. § 3568. We dismissed the petition because he did not show that "the Attorney General or the Director of the Bureau of Prisons has refused to afford him credit to which he is legally entitled." We reasoned:

"There are no circumstances present which suggest that the Attorney General will fail to perform his duty and grant credit

We also reject the Government's contention that because parole eligibility does not automatically entitle a prisoner to parole, "the proper remedy would not be habeas corpus but rather a petition for writ of mandamus to compel the Parole Board to consider appellant for parole." Immediate and unconditional release is not the only remedy available in a habeas corpus proceeding. *Peyton* v. *Rowe,* 391 U.S. at 66–67. An improper denial of parole eligibility is a sufficient restraint to justify habeas corpus relief. *Williams* v. *Peyton,* 372 F.2d 216 (4th Cir. 1967); *Martin* v. *Commonwealth of Virginia,* 349 F.2d 781 (4th Cir. 1965); *see also Halprin* v. *United States,* 295 F.2d 458 (9th Cir. 1961).[3]

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where it is warranted. Soyka should therefore exhaust the administrative means at his disposal before judicial review will be appropriate."

Nonetheless, *Soyka* is inapposite here because both parties acknowledge that the official position of the United States Board of Parole is that parole under § 4204 was made unavailable by 26 U.S.C. § 7237(d) for persons convicted of an offense committed before May 1, 1971, the effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

[3] *Peyton* v. *Rowe*, overruling *McNally* v. *Hill*, 293 U.S. 131 (1934), and thereby upholding habeas corpus jurisdiction to challenge an illegal sentence which a prisoner had not yet begun serving, does not necessarily dictate our conclusion in this case, because an illegal sentence to be served in the future would definitely deprive the prisoner of his freedom at some later date. Marrero would not definitely be deprived of freedom by the failure to hold a parole hearing because the parole board, in its discretion, could deny parole. Nonetheless, we think *Peyton's* liberal view of the breadth of the writ indicates the propriety of habeas corpus jurisdiction here.

Jones v. *Cunningham*, 371 U.S. 236 (1963), also suggests this conclusion. In *Jones*, the Court found habeas jurisdiction to challenge a sentence on which the prisoner had been paroled and, thus, released from prison. It held that the restraints im-

II

The district court denied appellant's habeas petition on two grounds: (1) it lacked jurisdiction since a remedy in the sentencing court is provided by 28 U.S.C. § 2255; and (2) the repeal of § 7237(d) did not affect appellant's eligibility for parole because he was convicted and sentenced prior to the effective date of the repeal. We think the court erred on both grounds.

Section 2255 provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears

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posed on a parolee's freedom were sufficient to invoke the "great Writ." It noted:

"[The writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." 371 U.S. at 243.

Reviewing *Peyton* and *Jones*, the Fourth Circuit reached exactly the same conclusion as we have, in *Martin* v. *Commonwealth of Virginia*, 349 F. 2d 781, 784 (4th Cir. 1965):

"We therefore hold, in keeping with the spirit of these developments, that because Martin's escape and larceny convictions bar his eligibility for parole, he is 'in custody' within the meaning of 28 U.S.C.A. § 2241."

The district court in the instant case did not discuss the question of the ripeness of the issues for adjudication. At the time Marrero's habeas petition was filed, he was unquestionably ineligible for parole under 18 U.S.C. § 4202, because one-third of his sentence had not expired. According to a letter dated July 18, 1973, submitted to this court by the United States Attorney, however, Marrero's parole eligibility date under § 4202 would be June 20, 1973, not September 1973 as appellant alleged. There is, therefore, no problem of ripeness at this time, and we need not decide whether *Peyton* v. *Rowe*, 391 U.S. 54 (1968), would justify habeas corpus relief prior to the eligibility date.

> that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Relief is available under § 2255 for a prisoner who claims he has been sentenced illegally. The statute requires him to "move *the court which imposed sentence* to vacate, set aside or correct the sentence." [Emphasis added.]

In the present case, however, appellant has not requested vacation or correction of his sentence. His petition, although not very specific, in essence requests a determination of the applicability of a statute, the operation of which is automatic and beyond the control of the sentencing court. We note that the judgment of conviction mentions neither § 7237(d) nor appellant's eligibility for parole. Section 2255 therefore does not require that appellant return to the Southern District of New York, his sentencing court, to seek the relief he now asks. *Soyka* v. *Alldredge,* No. 72–1918 (3d Cir., filed July 10, 1973); *Halprin* v. *United States,* 295 F.2d 458, 459 (9th Cir. 1961).

Our conclusion that relief need not be sought from the sentencing court is supported by the nature of the parole decision and its clear differences from sentencing. Parole is vested, subject to statutory limitations, in an administrative parole board which, in the federal system, is appointed by the President. 18 U.S.C. § 4201.[4] The parole mechanism provides the

[4] *See United States* v. *Bradley,* 41 U.S.L.W. 4368, 4370 n. 6 (1973):

"The decision to grant parole under § 4202 lies with the Board of Parole, not with the District Judge, and must be made long after sentence has been entered and the prosecution terminated."

prisoner with an administrative release prior to the completion of his judicially prescribed sentence. It is aimed at rehabilitating the parolee and facilitating his reintegration into socety by the time his sentence expires. Its importance lies in offering prisoners an opportunity for release from penal institutions before the expiration of their maximum term and, hopefully, for their successful reintegration into society as useful, productive persons. It also serves to relieve society from the heavy burden of keeping persons in prison. *See Morrissey* v. *Brewer,* 408 U.S. 471, 477 (1972); Comment, *The Parole System,* 120 U. Pa. L. Rev. 282, 284 (1971). Parole has become an integral and vigorous part of our modern penological system. "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U.S. at 477. Parole thus involves implementing a prisoner's sentence in the manner deemed best suited to attain the primary goals of criminal punishment, rehabilitation of the prisoner and protection of society from future deviant behavior. It does not involve modification of the sentence imposed.

The parolee is not granted the unconditional freedom of the ordinary citizen. The prisoner, upon parole release, agrees to abide by certain rules during the balance of his sentence. The rules are designed to accomplish the parole purposes of rehabilitation of the prisoner and protection of society. The parolee is usually required to report regularly to a parole officer and sometimes to make written reports of his activities. His travel is ordinarily limited. He is forbidden from associating with other parolees or convicted criminals. In addition, permission is often required before changing employment or marrying. *See* 408 U.S. at 478; 120 U.Pa. L. Rev. at 308.

For these reasons, we have concluded that the requested relief in this case is not authorized under § 2255 and that a habeas corpus petition presented to a district court judge in the district in which the prisoner is incarcerated is therefore proper.

III

We thus meet the basic issue: is the prisoner eligible for the benefits of § 4202? It is first necessary to understand the statutes involved. 18 U.S.C. § 4202 authorizes the release on parole of a federal prisoner after serving one-third of his sentence. 26 U.S.C. § 7237(d) prohibited parole under § 4202 for prisoners convicted of certain narcotics offenses, including Marrero's crimes. Section 7237(d), however, was repealed effective May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513, § 1101(b)(4)(A), 84 Stat. 1292. The question is whether that repeal is effective as to Marrero, who was convicted and sentenced on May 27, 1970. The answer depends on the interpretation of the savings provision of the 1970 Act, § 1103(a), 84 Stat. 1294, and the general statutory savings provision, 1 U.S.C. § 109.

Section 1103(a) of the Comprehensive Drug Prevention and Control Act provides:

> Prosecution for any violation of law occurring prior to the effective date of section 1101 [(May 1, 1971)] shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof.

The effect of § 1103(a) on parole eligibility under § 4202 has not been decided by the Supreme Court. Its decision in *Bradley* v. *United States,* 41 U.S.L.W.

4368 (U.S., Mar. 5, 1973), on a related matter, however, is instructive. *Bradley* involved parole eligibility under 18 U.S.C. § 4208(a), which authorizes the court imposing sentence to designate *in the sentence* early parole eligibility.[5] Congress had specifically provided that § 4208(a) does not apply to any offense carrying a mandatory penalty. Pub. L. 85–752, § 7, 72 Stat. 847 (1958). The Comprehensive Drug Abuse Prevention and Control Act of 1970 repealed the mandatory sentence for the crime Bradley committed. Bradley committed the crime before the effective date but was sentenced after it. The Court held that the repeal did not render Bradley eligible for parole under § 4208(a) because of the savings clause in § 1103(a). It reasoned that the word "prosecution" in § 1103 included sentencing and that sentencing constituted the judgment in a criminal case. Because the "decision to make early parole available under § 4208(a) must be made '[u]pon entering a judgment of conviction'" and therefore prior to the termination of the prosecution, it concluded that § 1103(a) barred parole under § 4208(a). The Court noted that the availability of parole under § 4202 "is a rather different matter, on

[5] 18 U.S.C. § 4208(a) reads:

"Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine."

which we express no opinion." 41 U.S.L.W. at 4370. Justices Brennan and White concurred in the decision but indicated without discussion their belief that parole under § 4202 was similarly unavailable.

Although *Bradley* did not decide the § 4202 question, it made clear that the decision to grant parole *under § 4202 occurs* "long after sentence has been entered and the prosecution has terminated."[6] In light of that statement and our previous analysis of the nature of parole, we hold that "prosecution" under § 1103(a) does not include the § 4202 parole eligibility decision, and therefore, does not bar Marrero from parole eligibility. A granting of parole does not affect the mandatory minimum sentence, only how it is executed.

United States v. *Caldwell,* 463 F.2d 590 (3d Cir. 1972), *United States* v. *Fiotto,* 454 F.2d 252 (2d Cir. 1972), and *United States* v. *Stephens,* 449 F.2d 103 (9th Cir. 1971), are inapposite here because they did not involve the effect of § 1103(a) on § 4202, the general parole statute; they involved, as did *Bradley,* decisions pertaining to sentencing.

The only remaining issue is the effect of 1 U.S.C. § 109, which provides in relevant part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so provide, and

[6] The Supreme Court has, in another context, specifically held that the "criminal prosecution" does not include the parole decision. In *Morrissey* v. *Brewer,* 408 U.S. at 480, the Court held that the rights guaranteed by the sixth amendment in "criminal prosecutions" do not apply in a parole revocation proceeding. It noted that, "Parole arises after the end of the criminal prosecution, including imposition of sentence."

> such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

This general savings statute was intended to obviate the common law's technical abatement of a prosecution by the repeal of the statute under which it proceeded. *Hamm* v. *Rock Hill*, 379 U.S. 306, 314 (1964). Therefore, the statute's purpose would not be furthered by applying it to preclude Marrero's parole eligibility under § 4202. His conviction and sentence will remain intact even if he is paroled. We therefore hold that permanent parole ineligibility is not a "penalty" incurred under § 7237(d).[7] We read § 7237(d)'s preclusion of parole as a dated legislative judgment as to the manner by which the actual penalty, i.e., the prison sentence, should be effectuated. To read it otherwise would preclude carrying out the apparent congressional judgment, in repealing the parole ban, that the rehabilitative goals of the criminal justice system will be furthered by parole. Moreover, we can find no rational basis that would justify barring parole for persons convicted of crimes committed before the Act's effective date, yet granting it to persons convicted of subsequent crimes. To the extent parole aids prisoner rehabilitation and consequently strengthens the tensile fabric of society, it is important that we avoid technical, purposeless construction which runs counter to the congressional plan to encourage prison rehabilitation.

---

[7] Although we stated in *Caldwell* that 1 U.S.C. § 109 preserves the "penalties" prescribed by § 7237(d), 463 F. 2d at 594, we did not decide that the bar to parole under § 4202 was a "penalty."

The judgment of the district court will be reversed and the case remanded for the entry of judgment granting the writ of habeas corpus with the direction that Marrero be released if he is not considered for parole within 60 days.

To the clerk:

Please file the foregoing opinion.

_____

Circuit Judge

Dated:

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 72-1842

UNITED STATES OF AMERICA EX REL. BENIGNO MARRERO, APPELLANT

v.

WARDEN, LEWISBURG, PENITENTIARY

(D.C. Habeas Corpus No. 1435)

On Appeal From the United States District Court for the Middle District of Pennsylvania

Present: GIBBONS and ROSENN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 26, 1972, be, and the same is hereby reversed and the cause is remanded to the said District Court with directions to enter judgment granting the writ of habeas corpus with the direction that Marrero be released if he is not considered for parole within sixty days in accordance with the opinion of this Court.

Attest:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk.

August 27, 1973.

APPENDIX C

United States District Court for the Middle District of Pennsylvania

UNITED STATES OF AMERICA EX REL. BENIGNO MARRERO, No. 69792–158

v.

WARDEN, LEWISBURG PENITENTIARY

HABEAS CORPUS NO. 1435

MEMORANDUM AND ORDER

Relator, Benigno Marrero, was convicted on two counts in the United States District Court for the Southern District of New York of receiving, concealing and facilitating the transportation and concealment of heroin in violation of 21 U.S.C. §§ 173 and 174, and of purchasing, dispensing and distributing cocaine not in or from the original stamped package in violation of 26 U.S.C. §§ 4701, 4703, 4704(a), 4711 (a) and 7237(a). As a second offender he was sentenced to 10 years imprisonment on each count to run concurrently. His sentence on the first count was prescribed by Section 174 of Title 21 which states, in pertinent part, that all provisions relating to sentencing are to be governed by Section 7237(d) of the Internal Revenue Code of 1954. The sentence on count two was prescribed by Section 7237(a) of Title 26 and was also governed by the provisions of 7237(d). The importance of Section 7237(d) for our purposes is that it specifically states that in the case of a violation of a

law relating to narcotic drugs, Section 4202 of Title 18 shall not apply.[1] Consequently at the time relator was sentenced, he was not eligible for parole under Section 4202. Relator filed this habeas corpus petition on February 24, 1972, contending that he is now being held in custody unlawfully inasmuch as Section 7237 (d) was fully repealed on May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91–513, 84 Stat. 1242 et seq., 21 U.S.C. §§ 801 et seq., and thus, the provisions of 18 U.S.C. § 4202 are not applicable to him, making him eligible for parole after one-third of his sentence has been served. Respondent, the Warden at the United States Penitentiary in Lewisburg, Pennsylvania, where relator is presently confined, challenges the petition alleging that (1) this Court is without jurisdiction because relator has an adequate remedy in the sentencing court under Title 28 U.S.C. § 2255 or a motion for correction or reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure, and (2) the Act of 1970 contained a "savings provision" stating that prosecutions for any violation of law occurring prior to May 1, 1971, shall not be affected by the new Act.

JURISDICTION

Relator concedes that 28 U.S.C. § 2255 is the proper remedy for a federal prisoner to attack the sentence imposed but argues that "parole eligibility is a question distinct and apart from the propriety of sentence" and that since § 2255 extends only to correcting sentence, habeas corpus is the proper procedure to

[1] 18 U.S.C. § 4202 provides, in pertinent part: "A Federal prisoner wherever confined and serving a definite term or terms of over one hundred and eighty days . . . may be released on parole after serving one-third of such term or terms. . . ."

determine future parole eligibility. Of course, if § 2255 relief is not available, then relator would not be obliged to apply to the sentencing court as § 2255 requires, viz:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.* [Emphasis supplied.]

I cannot accept relator's view on the limitations of § 2255. The United States Supreme Court has held conclusively that § 2255 was enacted to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined, *Hill* v. *United States,* 368 U.S. 424, 427 (1962), and that, in appropriate cases, it can also be utilized to provide a more flexible remedy. *Andrews* v. *United States,* 373 U.S. 334, 339 (1963). Moreover, if relief is possible under § 2255, it is the exclusive remedy and habeas corpus is barred for a federal prisoner. Wright, Federal Practice and Procedure: Criminal § 591. Relator must show, therefore, that a § 2255 motion is inadequate or ineffective to test the legality of his detention. He attempts to do this by contending that he does not seek to have his sentence corrected, i.e., ten years imprisonment, but merely seeks a determination of when he is eligible for parole maintaining that his "* * * sentence will not be affected if he is found eligible for parole * * *" However, part of the sentence imposed on May 27, 1970,

albeit not explicitly spoken, was that he was not eligible for parole under 18 U.S.C. § 4202. And even if it were not, the question raised as to parole eligibility certainly involves the legality of his detention even though immediate release is not forthcoming. It is not necessary, as relator claims, that § 2255 requires that a movant request immediate release from confinement as it expressly authorizes the District Court to "* * * discharge the prisoner or resentence him or grant a new trial *or correct the sentence as may appear appropriate*". (emphasis supplied) Relator makes many interesting arguments including that of parole eligibility being a question of status and not sentence; that the sentencing court cannot resolve the question of § 4202 parole eligibility; and that the availability of § 4202 is purely a question of statutory interpretation. Nevertheless, in my opinion, § 2255 is broad enough[2] and flexible enough to provide the remedy which relator seeks and, consequently, habeas corpus will not lie in this district.[3]

MERITS

Assuming arguendo, that this court has habeas corpus jurisdiction to decide the issues raised, I would

[2] Section 2255 expressly applies to a federal prisoner "in custody" and recently, in *Peyton* v. *Rowe*, 391 U.S. 54 (1968) the concept of custody was broadened in that a state prisoner was held to be in custody to the extent that he may in a federal habeas corpus proceeding challenge the constitutionality of a sentence scheduled for future service. Such broadening would be presumably applicable to § 2255 motions. See Wright, Federal Practice and Procedures: Criminal § 582; *Kaufman* v. *United States*, 394 U.S. 217 (1969).

[3] The applicability of Rule 35 of the Federal Rules of Criminal Procedure to this situation is a matter more appropriately left to the sentencing court.

rule against relator on the merits. In *United States* v. *Bradley,* 445 F. 2d 1181 (1st Cir. 1972), defendants were convicted on May 6, 1971 (five days subsequent to the effective date of the new Act) of a conspiracy occurring in March 1971, to sell a narcotic drug, and sentenced to a five-year term, the minimum punishment for first offenders under § 7237(b). Defendants contended in their appeal that since the new Act was in force when they were sentenced, the sentencing court was not bound by § 7237(d) and should have considered other sentencing alternatives, such as suspending sentence, granting probation or providing for parole. The court rejected this argument and held that a reading of the specific saving provision of the new Act, § 1103(a), and the general saving provision as originally enacted in 1871, 1 U.S.C. § 109, compelled the conclusion that narcotics offenses committed prior to May 1, 1971, are to be punished according to the law in force at the time of the offense. Section 1103(a) states:

> Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof.

The Court, reading 1103(a) against the background of § 109, held that the word "prosecutions" included the act of sentencing so that the limitations of § 7237 (d) continued to apply.

> Section 109 provides in pertinent part:
> The repeal of any statute shall not have the effect to release or extinguish any *penalty,* forfeiture, or *liability* incurred under such statute, *unless the repealing Act shall so expressly provide,* and such statute shall be

> treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty forfeiture or liability. [Emphasis supplied.]

Proceeding further, the court in Bradley stated that § 109 refers unambiguously to "any statute", whether that statute defines a crime, prescribes a penalty, or elaborates on the nature of the penalty to be imposed. The court summed up, as follows:

> Section 7237(d) was part of the "liability incurred" by violation of § 7237(b). That is, had trial and sentencing been simultaneous with the offense, the defendants herein clearly would have been ineligible for suspended sentences, parole, or probation. Regardless of whether the legislative grant of these sentencing alternatives is viewed as a release of penalty, under the mandate of § 109 the repealed statute, § 7237 (d) is "[to] be treated as still remaining in force."

As a result, the sentencing court was held to be powerless to impose sentencing alternatives, including parole. See also *United States* v. *Fiotto,* 454 F. 2d 252 (2d Cir. 1972).

More recently our Court of Appeals in *United States* v. *Brickley,* et al., decided July 5, 1972, —— F. 2d ——, rejected the Stephens rationale and chose to follow Bradley and Fiotto, in the following language:

> Accordingly, we must construe the "savings provisions" of Section 1103(a) to mean that sentencing for violations of the old Act shall not be affected by the new Act. Having reached this conclusion, it becomes clear that the pro-

visions of 1 U.S.C. § 109 have the effect of preserving the penalties prescribed by §§ 4705(a) and 7237(d), since Congress did not otherwise provide. [Emphasis supplied.]

Consequently, I conclude that the denial of parole eligibility in § 7237(d) is a penalty preserved by the savings provisions of § 1103(a) and 1 U.S.C. § 109.

WILLIAM J. NEALON,
United States District Judge.

Dated: July 26, 1972.

ORDER

This 26th day of July, 1972, in accordance with the memorandum this day filed, the petition of Benigno Marrero for a Writ of Habeas Corpus is denied.

WILLIAM J. NEALON,
United States District Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-831

WARDEN, LEWISBURG PENITENTIARY, PETITIONER

v.

BENIGNO MARRERO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 483 F. 2d 656. The memorandum and order of the district court (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 27, 1973. On October 25, 1973, Mr. Justice Brennan granted a stay of mandate pending the timely filing of a petition for a writ of certiorari, and continuing thereafter until this Court determines the matter (App. 14). The petition for a writ of certiorari was filed on November 26, 1973 and

was granted on January 7, 1974 (App. 15). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision in 26 U.S.C. (1964 ed., Supp. V) 7237(d) that certain narcotics offenders are not eligible for parole under 18 U.S.C. 4202 survives the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, so that a narcotics offender who committed his offenses before the effective date of the new statute may not be considered for parole even though he has served more than one-third of his sentence.

STATUTES INVOLVED

Section 103 of the Narcotic Control Act of 1956, 70 Stat. 568, as amended, 26 U.S.C. (1964 ed. and Supp. V) 7237, provided in pertinent part:

Violation of laws relating to narcotic drugs and to marihuana

(a) *Where no specific penalty is otherwise provided.*

Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 [26 U.S.C. (1964 ed.) 4701–4762] for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be im-

prisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

* * * * *

(d) *No suspension of sentence; no probation; etc.*

Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended [21 U.S.C. (1964 ed.) 174, 176a, 176b], or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted to narcotic drugs section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24–201 and following), as amended, shall not apply.

Section 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1294, provides in pertinent part:

> Prosecutions for any violation of law occuring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section * * *, or abated by reason thereof.

and in the case of a violation of a law relating

Section 109 of the Act of July 30, 1947, 61 Stat. 635, 1 U.S.C. 109, provides in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Prisoners eligible.

18 U.S.C. 4202, provides as follows:

> *Prisoners eligible*
>
> A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, respondent was convicted on a two count indictment of having received, facilitated the transportation of, and concealed heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174 (count 1) and of having purchased, dispensed and distributed cocaine not in or from its original stamped package, in violation of 26 U.S.C.

(1964 ed.) 4701, 4703, 4704(a), 4771(b) and 7237(a) (count 2). On May 27, 1970 (before the May 1, 1971, effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970), he was sentenced as a second offender to concurrent terms of ten years' imprisonment on each count. The court of appeals affirmed (450 F. 2d 373 (C.A. 2)), and this Court denied certiorari, 405 U.S. 933. Respondent is now serving that sentence in the federal penitentiary at Lewisburg, Pennsylvania.

On February 24, 1972, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania (App. 6–7). He claimed that since the statute in effect at the time of his sentencing (26 U.S.C. (1964 ed., Supp. V) 7237(d))—under which he was ineligible for parole under 18 U.S.C. 4202—was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, he should be eligible for parole under 18 U.S.C. 4202 in September 1973, when one-third of his sentence had been served.[1]

The district court held that the 1970 statute did not repeal the prohibition on parole eligibility in the prior statute, on the ground that such prohibition was a penalty preserved by the specific savings provisions of Section 1103(a) of the 1970 statute and by 1 U.S.C. 109 (Pet. App. C). The Court of Appeals for the

[1] Respondent actually became eligible for parole on June 20, 1973, if 18 U.S.C. 4202 is applicable to him. Neither court below considered whether habeas corpus relief was appropriate before that date, a question that now appears to be moot.

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Third Circuit reversed, holding that the 1970 statute had repealed the prohibition on parole eligibility in the prior act (Pet. App. A). It granted the writ and directed that respondent be released unless he were considered for parole within 60 days. The court's mandate has been stayed pending this Court's determination.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Bradley* v. *United States,* 410 U.S. 605, this Court held that the prohibition of suspended sentences, probation, and early parole under 18 U.S.C. 4208(a)[2] imposed on certain narcotics offenders convicted under the Narcotic Control Act of 1956 survived the repeal of that Act by the Comprehensive Drug Abuse Prevention and Control Act of 1970. However, since the petitioners in *Bradley* had only begun service of their sentences, and were thus in any event not eligible for parole under 18 U.S.C. 4202, the Court did not reach the question whether the ban on Section 4202 parole also survived the enactment

[2] 18 U.S.C. 4208(a) permits the judge at sentencing to specify a minimum term after which the defendant shall become eligible for parole. If no such designation is made, the general parole statute, 18 U.S.C. 4202, provides that a federal prisoner is eligible for parole after he has served one-third of his sentence. Under both statutes, the Parole Board must, when the prisoner becomes eligible, determine whether or not to place him on parole.

of the 1970 statute. Marrero has served one third of his sentence; therefore, the question of parole eligibility under 18 U.S.C. 4202, left open by the *Bradley* majority, is squarely presented here.

Two members of the Court did reach that question in *Bradley* and decided that parole was unavailable under Section 4202. Mr. Justice Brennan and Mr. Justice White in a separate statement at 401 U.S. 611-612, declared:

> that § 1103(a) forecloses the availability of parole under both 18 U.S.C. § 4202 and 18 U.S.C. § 4208(a), and that even if this were debatable as to § 4202, that the general saving statute, 1 U.S.C. § 109 clearly mandates that conclusion as to that section. * * *

We submit that this view is correct. The Narcotic Control Act of 1956 imposed ineligibility for parole under 18 U.S.C. 4202 as a penalty for conviction of certain narcotics offenses. When the 1956 Act was repealed, this penalty was saved by 1 U.S.C. 109, as well as by the necessary implication of the legislative history of the repealing act, the Comprehensive Drug Abuse Prevention and Control Act of 1970. Moreover, this Court's analysis of the specific savings clause in the 1970 Act, Section 1103(a), 84 Stat. 1294, supports the conclusion that the ineligibility for parole under 18 U.S.C. 4202 is part of the sentence, and thus of the prosecution saved by Section 1103(a).

ARGUMENT

AN OFFENDER WHO VIOLATED THE FEDERAL NARCOTICS LAWS PRIOR TO THE EFFECTIVE DATE OF THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970 IS INELIGIBLE FOR PAROLE UNDER 18 U.S.C. 4202

A. CONGRESS DID NOT INTEND THAT THOSE WHO HAD VIOLATED THE 1956 ACT WOULD BECOME ELIGIBLE FOR PAROLE UNDER 18 U.S.C. 4202 WHEN THE 1970 ACT BECAME EFFECTIVE

The determination of the penalties for criminal offenses is essentially a matter of legislative policy, subject only to constitutional limitations. If the legislative judgment is sufficiently clear, it is conclusive, even if a different policy might seem wiser or more enlightened. *Gore* v. *United States,* 357 U.S. 386, 393; *Bell* v. *United States,* 349 U.S. 81, 82–83; cf. *Powell* v. *Texas,* 392 U.S. 514.

Neither the Bureau of Prisons nor the Board of Parole believes that it would impede the proper performance of their functions if they were required to consider narcotics offenders convicted under the prior statute eligible for parole under 18 U.S.C. 4202. Such a requirement would not demand the granting of parole to any individual prisoner unless the Board determines that his supervised release from confinement is in the interests of both the prisoner and society. But these agencies are obliged to execute the will of Congress, and it appears to them that Congress did not intend that such offenders would be eligible for parole.

1. The no parole provision was a penalty imposed by the Narcotic Control Act of 1956

Congress stated in the 1970 Comprehensive Drug Abuse Prevention and Control Act that "[p]rosecutions" for violations occurring prior to May 1, 1971 were not to be affected (§ 1103(a), 84 Stat. 1294). Since there was no express provision to the contrary, the 1970 Act must also be construed as including the provisions of the general saving statute, *United States* v. *Reisinger,* 128 U.S. 398, 402–403; *United States* v. *Carter,* 171 F. 2d 530, 532 (C.A. 5).[3] That statute provides that the repeal of a statute does not "release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide * * *" (1 U.S.C. 109).

Therefore, the controlling inquiry in this case is whether Congress considered ineligibility for parole under 18 U.S.C. 4202 part of the "prosecution" for violation of the 1956 Act, or of the "penalty, forfeiture, or liability" incurred under that Act. If so, then respondent remains ineligible for parole.

We submit that Congress did intend that the ban on parole under 18 U.S.C. 4202 should survive the

[3] This is true even when the repealing act contains its own specific saving provision, so long as the repealing act does not provide otherwise. See *Duffel* v. *United States,* 221 F. 2d 523, 524 (C.A. D.C.); *United States* v. *Kirby,* 176 F. 2d 101, 104 (C.A. 2); *Lovely* v. *United States,* 175 F. 2d 312, 316 (C.A. 4). The 1970 Act does not attempt to bar the application of the general saving statute.

repeal of the 1956 Act, and that the same result follows under either Section 1103(a) or 1 U.S.C. 109.[4] But, as Justices White and Brennan noted in *Bradley*, even if that result were debatable under Section 1103 (a), it is mandated by 1 U.S.C. 109 (410 U.S. at 612).

Indeed, the statute on its face shows that Congress intended in 26 U.S.C. (1964 ed., Supp. V) 7237(d)—which, *inter alia*, proscribed parole under 18 U.S.C. 4202—to describe the penalties for violation of the 1956 Act. Section 7237 is entitled "violation of laws relating to narcotic drugs and to marihuana"; its various sections define the penalties to be imposed, one of which, by virtue of 7237(d), is ineligibility for parole. Congress thus unequivocally manifested its determination that one of the penalties to be imposed on certain narcotics offenders was to render them ineligible for parole after conviction.

The legislative history of the Narcotic Control Act of 1956 also shows that denial of parole was part of the method Congress chose to punish the narcotics trafficker severely. After extensive hearings, the Sub-

[4] The question whether Section 1103(a) applies is significant, at least theoretically, in one context. If the inapplicability of Section 4202 is part of the prosecution saved by Section 1103(a), it is part of the sentence (see *Bradley*, *supra*, 410 U.S. at 609). It then follows that the district court was without jurisdiction to entertain respondent's habeas corpus petition since his exclusive remedy was to seek relief from the sentencing court, 28 U.S.C. 2255. We have not argued the jurisdictional issue separately, since it is entirely controlled by the conclusion concerning the scope of Section 1103(a): If that section covers ineligibility for parole under 18 U.S.C. 4202, the issue is for the sentencing court under 28 U.S.C. 2255, and the district court here had no jurisdiction (see Pet. App. C 16a–18a).

committee on Narcotics of the House Committee on Ways and Means concluded:

> Effective control of the vicious narcotic traffic requires not only vigorous enforcement but also certainty of punishment. Conclusive evidence was presented during your subcommittee's investigation that the imposition of heavier penalties was the strongest deterrent to narcotic addiction and narcotic traffic. In those areas of the country where we found leniency in sentencing the prevailing practice, drug addiction and narcotic traffic without exception are on the increase. Also without exception, wherever heavier penalties are imposed by the courts, narcotic traffic and addiction are at a virtual minimum or nonexistent.
>
> * * * * *
>
> However, it must be recognized that special incentives in our penal systems serve to decrease the actual time spent in a penal institution under a sentence imposed by the court. The violator is eligible for parole after serving one-third of his sentence. As is true of all Federal violators, he is subject to conditional release after serving two-thirds of his sentence. Available data from the Bureau of Prisons indicate that a narcotic violator actually serves an average of less than two-thirds of the sentence imposed by the court. This tends to defeat the purposes of the act and should be corrected as set forth in the subcommittee recommendations. [H. Rep. No. 2388, to accompany H.R. 11619, 84th Cong., 2d Sess., pp. 63–64.]

Thus Section 7237(d) represented a clear and positive decision by Congress to make the absolute pro-

hibition against parole an inherent element of the penalty imposed on the narcotic trafficker.[5] Ineligibility for parole is thus a penalty provided for violation of the 1956 Act. Under 1 U.S.C. 109, it survived the enactment of the contrary provisions of the 1970 law.

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[5] The fact that denial of parole is a part of the penalty is further shown by its effect upon the convicted defendant. Any prisoner who is released on parole undoubtedly considers that he has been subjected to a less severe penalty than if he were incarcerated for the full term of his sentence. See *United States* v. *Ross*, 464 F. 2d 376, 379 (C.A. 2). The converse is equally true: the statutory denial of the possibility of parole must naturally be regarded as increasing the penalty for the crime. The Sixth Circuit stated the correct view in *Harris* v. *United States*, 426 F. 2d 99, 100:

"It may be 'legislative grace' for Congress to provide for parole but when it expressly removes all hope of parole * * * this is in the nature of an additional penalty. * * *"

Other courts have recognized this fact in holding that a guilty plea taken without informing the defendant of his ineligibility for parole is invalid, since it is made without understanding the consequences of the plea. As the court in *Berry* v. *United States*, 412 F. 2d 189 (C.A. 3), noted, Rule 11, Fed. R. Crim. P., requires that the pleader be aware of the outer limits of punishment, and the loss of parole eligibility is "an inseparable ingredient of the punishment imposed. Its effect is so powerful that it translates the term imposed by the sentencing judge into a mandate of actual imprisonment for a period of time three times as long as that ordinarily expected." *Id.* at 192. Accord, *Munich* v. *United States*, 337 F. 2d 356, 361 (C.A. 9); *Jenkins* v. *United States*, 420 F. 2d 433, 437 (C.A. 10); *Harris* v. *United States*, 426 F. 2d 99 (C.A. 6); *Bye* v. *United States*, 435 F. 2d 177 (C.A. 2). Contra, *Trujillo* v. *United States*, 377 F. 2d 266 (C.A. 5), certiorari denied, 389 U.S. 899, and *Smith* v. *United States*, 324 F. 2d 436 (C.A.D.C.), certiorari denied, 376 U.S. 957.

2. The 1970 Comprehensive Drug Abuse Prevention and Control Act was not intended to benefit those convicted under the 1956 Act

This conclusion might be doubtful if the 1970 Comprehensive Drug Abuse Prevention and Control Act reflected a subsequent congressional conclusion that the no-parole element of the penalty was too harsh, and should be eliminated in all cases. The 1970 Act did add a rehabilitative goal to the basically punitive approach of the 1956 Act. It provided a more flexible approach emphasizing rehabilitation for certain offenders—primarily for "individual abusers." The legislative history shows, however, that the purpose of the new sentencing flexibility was not to benefit incarcerated narcotics traffickers, but to increase the likelihood that those who engaged in such traffic would be prosecuted and convicted. In explaining the bill's approach to penalties, the House Report stated:

> The foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case.
>
> The severity of existing penalties, * * * have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat

> more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.[6]

It would be inconsistent with this approach to infer a congressional intent to permit those already convicted of violations of the 1956 Act to benefit from the more lenient provisions of the 1970 Act. Nothing in the legislative history supports such an inference. The purpose of the more lenient sentencing provisions of the 1970 Act was not to benefit those previously convicted under the prior statute, but to facilitate convictions under the new one.

Indeed, to read the 1970 Act as repealing the ban on parole eligibility under 18 U.S.C. 4202 would create a serious dilemma, since the 1970 Act still prohibits parole for those whose narcotics violations are part of a continuing criminal enterprise (21 U.S.C. 848). Therefore, unless those convicted under the 1956 Act remain ineligible for parole, the Parole Board will either have to consider all those so convicted eligible under 18 U.S.C. 4202, or attempt to determine which offenders remain ineligible under the provisions of the new law. Both alternatives are unacceptable.

If the first approach were adopted, those guilty of criminal activities for which Congress has denied parole under both the old and new laws would be con-

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[6] H. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess.) p. 11.

sidered eligible for parole, and perhaps released, in direct disregard of the consistent congressional directive.

The alternative is scarcely preferable. Since there was no substantive offense under the 1956 Act comparable to the one now defined in 21 U.S.C. 848, the Parole Board would have to attempt to determine whether the offender would have been convicted under 21 U.S.C. 848 if it had been in effect at the time of his offense. At best this requires a judgment on a highly speculative matter for which the Board is not particularly equipped, and imposes a substantial administrative burden on the Board.[7] At worst, it could constitute an infringement on the proper function of the jury, since the Board would have to determine whether the evidence was such that a jury would have found the offender guilty of a crime other than that for which he was actually convicted.

There is no indication in the 1970 Act or its legislative history that Congress intended to create such a dilemma. Instead, the only conclusion that can realistically be drawn is that Congress recognized that the ineligibility for parole under the 1956 Act was part of the penalty under that Act which was saved under 1 U.S.C. 109. It therefore assumed that there was to be no change in parole eligibility for those convicted of violating the 1956 Act.

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[7] The instant case provides a good example, Marrero was a second offender; this fact raises the possibility that he was part of a continuing criminal enterprise. But since he was convicted under the 1956 Act, the record does not show whether his offenses were of the type condemned by 21 U.S.C. 848.

3. The general savings statute applies in this situation

The same result follows from the language of 1 U.S.C. 109 itself. That statute, originally enacted in 1871, provides:

> [T]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability * * *. [Act of February 25, 1871, Section 4, 16 Stat. 432.]

At common law, when a criminal statute was replaced by another statute or was amended to lessen the punishment, the defendant was entitled to the benefit of the new Act, although his offense was committed prior to the effective date thereof, unless there was a general saving statute or a specific clause in the new act. Beginning with *United States* v. *Reisinger,* 128 U.S. 398, the general saving clause (now 1 U.S.C. 109) has been held to apply to criminal laws and the punishments attached to them, and the effect has been to preserve the vitality of an amended or repealed law for purposes of both prosecuting and punishing offenses committed while the law was in effect. See *Lovely* v. *United States,* 175 F. 2d 312 (C.A. 4); *Hurwitz* v. *United States,* 53 F. 2d 552 (C.A. D.C.); *Duffel* v. *United States,* 221 F. 2d 523 (C.A. D.C.); *United States* v. *Kirby,* 176 F. 2d 101 (C.A. 2); *United States* v. *Brown,* 429 F. 2d 566 (C.A. 5); *Faubion* v. *United States,* 424 F. 2d 437 (C.A. 10); *Maceo* v. *United States,* 46 F. 2d 788 (C.A. 5);

United States v. *Smith*, 433 F. 2d 341 (C.A. 4); *Stillman* v. *United States*, 177 F. 2d 607 (C.A. 9); *United States* v. *Carter*, 171 F. 2d 530 (C.A. 5); *United States* v. *Taylor*, 123 F. Supp. 920 (S.D. N.Y.), affirmed on opinion below, 227 F. 2d 958 (C.A. 2).

As we have shown, the ineligibility for parole was part of the penalty imposed under the 1956 Act. Since 1 U.S.C. 109 provides that the repeal of an Act does not have the effect of extinguishing any penalty incurred thereunder, it follows that the repeal of the 1956 Act does not extinguish respondent's ineligibility for parole.

The court below avoided the effect of 1 U.S.C. 109 by concluding that it was "intended to obviate the common law's technical abatement of a prosecution by the repeal of the statute under which it proceeded. *Hamm* v. *Rock Hill*, 379 U.S. 306, 314 (1964)" (Pet. App. A 12a). It therefore concluded that the purpose of that section would not be furthered by applying it to preclude parole eligibility under Section 4202.*

In our view, however, *Hamm* v. *Rock Hill* supports the opposite conclusion. There this Court cited, as an example of a situation in which the general saving statute would apply to prevent a technical abatement, the case of a new statute substituting more severe penalties for those originally applicable (379 U.S. at 314). It distinguished such a situation from the one before it, in which the defendant had been convicted

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*This analysis is inconsistent with the statement of Justices Brennan and White in *Bradley;* it also finds no support in the majority opinion, which at least implies the applicability of 1 U.S.C. 109. 410 U.S. at 611, n. 6.

under state trespass statutes for peacefully sitting-in at public lunch counters. That conduct had become affirmatively protected by statute and thus transformed into a right.*

Although, in the present case, the new statute ameliorated the penalties previously applicable rather than increasing them, Section 109 nonetheless applies to prevent abatement, since no new right has been created or recognized. Indeed, this Court has applied Section 109 to avoid abatement even when the conduct involved was no longer a crime under the new law. See *Pipefitters* v. *United States,* 407 U.S. 385; *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535, 553–554; *Hertz* v. *Woodman,* 218 U.S. 205; *United States* v. *Reisinger, supra.*

The offense of selling cocaine has undergone no such transmutation from prohibited crime to protected right as had the conduct in *Hamm.* Indeed, unlike the conduct in *Pipefitters, Allen, Hertz,* and *Reisinger,* respondent's conduct remained criminal under both the old and new acts; the new act simply altered the specific elements of certain offenses and changed the penalties. Both the legislative history concerning the purposes of the legislation and the inclusion of a specific saving clause reflect congressional

* In *Pipefitters* v. *United States,* 407 U.S. 385, this Court similarly interpreted *Hamm* as applying only where a right is substituted for a crime. Although subsequent legislation there made lawful what had been a crime, the Court held that the general saving statute left the pre-trial conduct fully punishable. Significantly, the Court reached that conclusion even after finding that there was no demonstration of specific congressional intent on this point when the new act was passed.

intent to let the pre-repeal law control pre-repeal violations. We submit, therefore, that 1 U.S.C. 109 applies in this situation.

B. THIS COURT'S DECISION IN BRADLEY SUPPORTS THE CONCLUSION THAT PAROLE UNDER SECTION 4202 IS UNAVAILABLE TO NARCOTICS OFFENDERS SENTENCED UNDER THE 1956 ACT

We turn now to the applicability of Section 1103 (a) of the 1970 Drug Abuse Prevention and Control Act, which preserves "prosecutions" under the 1956 Act. Section 1103(a) was analyzed in *Bradley;* that analysis, we submit, indicates that eligibility for parole under 18 U.S.C. 4202 is as much a part of the "prosecution" as eligibility for parole under 18 U.S.C. 4208(a).

Bradley held that the determination of parole eligibility under 18 U.S.C. 4208(a) is part of the sentencing process, and thus of the "prosecution" saved by Section 1103(a) of the 1970 Act. This is so because, under 18 U.S.C. 4208(a), the decision when an offender will become eligible for parole is made by the judge at the time of sentencing (410 U.S. at 610–611). Viewed pragmatically, the decision when an offender will become eligible for parole under 18 U.S.C. 4202 is also made by the judge at the time of sentencing. To be sure, under Section 4208(a) the decision is made explicitly as part of the sentence, while under Section 4202 the decision is made implicitly by fixing the length of the sentence. Nevertheless, since judges are well aware of the limitations of Section 4202, an offender's eligibility for parole upon the expiration

of one-third of his sentence is undoubtedly a factor which is ordinarily considered in imposing sentence.[10]

The time when the offender becomes eligible for parole, whether under Section 4208(a) or under Section 4202, is thus a decision made by the trial judge at sentencing. Under the teaching of *Bradley*, this is part of the prosecution saved by Section 1103(a).[11]

The court below found support for its conclusion that the "§ 4202 parole eligibility decision" is not part of the prosecution saved by Section 1103(a) in this Court's statement in *Bradley* that the decision to grant parole under Section 4202 occurs "long after sentence has been entered and the prosecution terminated" (Pet. App. A 11a; 410 U.S. at 611, n. 6).[12] In

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[10] Marrero could have been sentenced to as much as forty years imprisonment under count 1 (21 U.S.C. (1964 ed.) 174) and twenty years' imprisonment under count 2 (26 U.S.C. (1964 ed.) 7237(a)). Although it is not possible to determine what sentence the trial judge would have imposed had he believed that Marrero would be eligible for parole under Section 4202, it is at least clear that the judge in imposing sentence did not contemplate Marrero's release after little more than three years.

[11] The court in *United States* v. *Marshall*, 485 F. 2d 1062 (C.A. D.C.), reached the question at issue here when remanding for resentencing precisely because the defendant's parole eligibility *vel non* under 18 U.S.C. 4202 was relevant to the judge's decision on the length of the sentence to be imposed, *id* at 1065.

[12] We do not believe that the Court in *Bradley*, which "express[ed] no opinion" on the "rather different matter" of Section 4202 parole (410 U.S. at 611), nevertheless intended, in the remark quoted above, to imply that such parole was not part of the prosecution saved by Section 1103(a). Instead, we think the quoted remark was intended simply to show why there was no need to consider the Section 4202 issue in rejecting peti-

this respect, however, parole under Section 4202 is no different from parole under Section 4208(a), which *Bradley* held to be part of sentencing. Under both sections, the Parole Board decides whether to grant parole when the designated minimum period of incarceration has been served, some time after sentencing. But *Bradley* indicates that this is not significant. Since the decision concerning the time at which an offender will become eligible for parole is made by the trial judge at sentencing under both sections, parole *eligibility* under both sections is part of the sentence, and thus of the prosecution.[13]

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tioners' contention that they were entitled to be sentenced under the 1970 Act. The question of the ripeness of the Section 4202 issue and the distinction, if any, between that issue and the Section 4208(a) issue was not raised in the lower court proceedings in *Bradley*, nor was it briefed or argued to this Court.

[13] *Morrissey* v. *Brewer*, 408 U.S. 471, which indicates that the decision by administrative authorities to grant or deny parole is not part of the "prosecution" for purposes of the Sixth Amendment, is entirely consistent with this conclusion. Our argument is that the decision concerning the time of eligibility for parole, not the actual grant or denial of parole, is part of the prosecution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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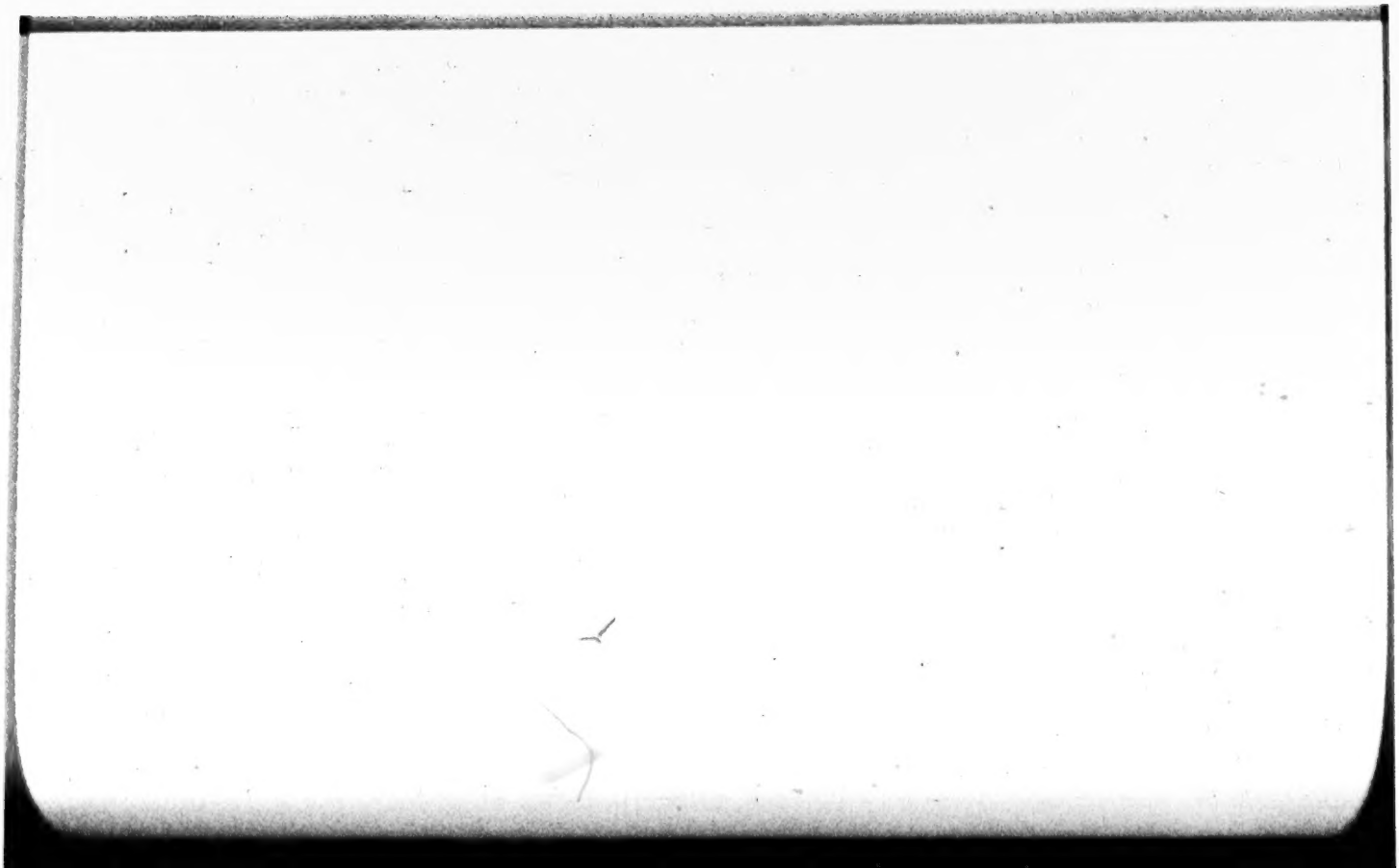
FEBRUARY 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-831

WARDEN, LEWISBURG PENITENTIARY, *Petitioner,*

v.

BENIGNO MARRERO, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

CONSENT OF THE PARTIES TO FILE AS AMICUS CURIAE

The Washington Lawyers' Committee for Civil Rights Under Law files this brief with the consent of the parties. The parties' letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963, following a conference of lawyers called at the White House by President John F. Kennedy. The Washington Committee was one of 12 regional Committees established in 1968 to pursue the Committee's goal of eliminating discrimination and injustice for minority groups in urban centers. It is a nonprofit private corporation whose principal purpose is to involve private lawyers in Washington, D. C. in the struggle to assure all citizens of their civil rights. During the past three years the Committee has received two grants of Law Enforcement Assistance Administration funds from the D.C. Narcotics Treatment Administration to provide legal services to heroin addicts at various stages of the criminal justice system. The Committee is currently administering the Narcotic Addict Parole Project whereby volunteer lawyers are providing legal representation to individuals eligible for parole. These services continue for six months following release on parole and include efforts to challenge discrimination and due process violations arising from the parole process.

The Committee believes that parole should be available for all sentenced offenders. For this reason, it is filing this brief as amicus curiae.

SUMMARY OF ARGUMENT

In the Comprehensive Drug Abuse Prevention and Control Act of 1970, Congress made a deliberate determination that the prohibition on parole for narcotics offenders served none of the objectives of the criminal

law and, indeed, was counterproductive. The Government advances no rational reason for continuining to prohibit parole after the effective date of the 1970 Act. Thus, the prohibition now constitutes punishment without purpose and creates an irrational distinction between similar classes of narcotics offenders, in violation of due process and equal protection guarantees.

As a matter of statutory construction, the saving clause in the 1970 Act, which speaks of "prosecutions," does not prevent abatement of the prohibition on parole. The 1970 saving clause prevails over the general saving clause, 1 U.S.C. § 109, since it is the latest expression of legislative will.

ARGUMENT

I. As a Matter of Constitutional Law, the Prohibition on Parole Contained in 26 U.S.C. § 7237(d) Cannot Survive the Enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

The Comprehensive Drug Abuse Prevention and Control Act of 1970 was enacted "to provide increased research into, and prevention of, drug abuse and drug dependence; *to provide for treatment and rehabilitation of drug abusers and drug dependent persons;* and to strengthen existing law enforcement authority in the field of drug abuse."[1] As part of its effort to achieve these goals, Congress specifically and deliberately ended the prohibition on parole for narcotics offenders, with one narrow exception. Indeed, a primary purpose of the legislation was to eliminate mandatory minimum sentences which barred parole. Senator Thomas Dodd, floor manager of the bill in the Senate, stated:

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[1] P.L. 91-513, preamble (emphasis added).

> "In summation, Mr. President, I believe that the one part of S. 3246 which takes the biggest and best step forward is the new penalty structure we have proposed.
>
> "The main point here was to do away with the mandatory minimum sentence except for the professional criminal involved in a continuous criminal enterprise.[2]

Secretary of HEW Finch, in a letter to Congressman Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, stated:

> "Especially important are the provisions of S. 3246 to make penalties more flexible and more appropriately adopted to various offenses."[3]

The House Report made clear that the new legislation was adopting the position of the two Presidential Commissions—the Prettyman Commission on Narcotics and Drug Abuse (1963) and the Katzenbach Commission on Law Enforcement and Administration of Justice (1966)—which had called for the elimination of the prohibition on parole.[4] The Report stressed "When the penalties involve imprisonment . . . the rehabilitation of the individual, rather than retributive punishment, should be the major objective."[5] Similarly, the Senate Report noted that:

> "The main thrust of the change in the penalty provisions is to eliminate all mandatory minimum sentences for drug law violations except for a spe-

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[2] 116 Cong. Rec. 1654, January 28, 1970.

[3] 3 U.S. Code, Cong. & Admin. News 4634 (1970).

[4] *Id.* at pp. 4584-85, 4587-88.

[5] *Id.* at p. 4575.

> cial class of professional criminals. The field of penology has maintained the position that mandatory sentences hamper the process of rehabilitation of offenders.[6]

Congress recognized that a more flexible penalty structure not only enhanced the process of rehabilitation but also created a more effective system of punishment and deterrence. As the House Report stated:

> "Through the changes in the penalty provisions of existing laws, particularly through elimination of mandatory minimum sentences, the Committee has sought to arrive at a more realistic, more flexible, and thus more effective system of punishment and deterrence of violation of the Federal narcotic and dangerous drug laws."[7]

In short, Congress concluded that all the objectives of the criminal law—rehabilitation, punishment and deterrence—were best served by eliminating the prohibition on parole. The question before the Court is whether there is any rational basis for continuing the prohibition with respect to pre-1971 offenders now—three years after the effective date of the Act[8]—and for many years to come.

It must be emphasized that Congress itself has advanced no reasons for continuing the prohibition. Indeed, as amicus will argue below, the language of the Drug Control Act indicates that Congress did not intend the prohibition to continue. In these circumstances, the Government has been forced to hypothesize

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[6] S. Rep. No. 91-613, 91st Cong., 1st Sess. (1969).

[7] 3 U.S. Code, Cong. & Admin. News 4638 (1970).

[8] The Comprehensive Drug Abuse Prevention and Control Act of 1970 became effective on May 1, 1971.

a reason for continuing the prohibition. The Government points out that the 1970 Act still prohibits parole for those whose narcotics violations are part of a continuing criminal enterprise (21 U.S.C. § 848). Therefore, the Government contends, unless those convicted under the old law remain ineligible for parole, the Parole Board will either have to consider all those so convicted eligible, even those who committed offenses now covered by 21 U.S.C. § 848, or attempt to determine which offenders remain ineligible under the provision of the new law. "Both alternatives" the Government says are "unacceptable."[9]

The Government's argument is without merit for two reasons. First, it is clear that 21 U.S.C. § 848 was intended to be, and is, a narrow exception to the general policy of permitting parole. In fact, the Administrative Office of the United States Courts has no record of any indictments ever having been filed under 21 U.S.C. § 848.[10] If the Government has made little or no effort to use 21 U.S.C. § 848 to bar offenders from parole since 1971, it can hardly argue that the mere existence of 21 U.S.C. § 848 should be used to bar parole for pre-1971 offenders. Second, when reviewing parole applications the Parole Board specifically takes into account the nature and circumstances of the applicant's offense.[11] In effect, therefore, it makes the very

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[9] Brief for Petitioner, pp. 14-15.

[10] Telephone conversation between Joseph Onek, counsel for amicus curiae, and Mrs. Dolores Sawyer, Data Analysis Supervisor, Administrative Office of the United States Courts, March 11, 1974. The Administrative Office collects statistics from every United States District Court.

[11] See 28 C.F.R. 2 § 2, 2 § 15, in 39 Fed. Reg. 26652-53 (1973).

determination contemplated by 21 U.S.C. § 848—*i.e.*, whether the offender is an individual drug abuser or a big-time professional pusher.

The Government is attempting to create an "irrebuttable presumption," blatantly contrary to fact, that all pre-1971 offenders committed acts which would now violate 21 U.S.C. § 848. Such a presumption is particularly inapposite here because a case-by-case approach causes little administrative inconvenience.[12] Indeed, as the Government candidly acknowledges, "neither the Bureau of Prisons nor the Board of Parole believes that it would impede the proper performance of their functions if they were required to consider narcotics offenders convicted under the prior statute eligible for parole under 18 U.S.C. § 4202." [13]

The Government hints at another possible basis for continuing the prohibition by implying that judges might have given some pre-1971 offenders higher sentences if they had known the offenders would be eligible for parole.[14] In fact, this is highly unlikely, since, as the Government itself notes, there was a widespread consensus that penalties under the old law were too severe.[15] More important, the Board of Parole would encourage the submission of advice from sentencing judges before granting parole.[16] Thus, if a

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[12] See *Cleveland Board of Education* v. *LaFleur*, 42 U.S.L.W. 4187 (Jan. 21, 1974); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

[13] Brief for Petitioner, p. 8.

[14] Brief for Petitioner, pp. 19-20.

[15] *Id.* at pp. 13-14.

[16] See 28 C.F.R. 2 § 14, in 39 Fed. Reg. 26653 (1973).

sentencing judge believes that a pre-1971 narcotics offender is being released prematurely, he can so inform the Board of Parole.

In sum, the Government advances no legitimate purpose and provides no rational basis for continuation of the prohibition on parole. *Bradley* v. *United States*, 410 U.S. 605 (1973), is readily distinguishable. In *Bradley*, the issue was whether the prohibition on suspended sentences, probation and court-ordered parole eligibility survived the 1970 Drug Control Act. If it were held that, as a constitutional matter, the prohibition did not survive, every offender convicted under the old law would have been eligible for a new sentencing hearing in the district court. Certainly, it would be reasonable for Congress to seek to avoid this violent breach of the concept of finality in the criminal process. Indeed, one of the primary purposes of saving clauses is precisely to uphold the concept of finality. See, *e.g.*, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120, 145-46 and *passim* (1972). Thus, there was a legitimate purpose and rational basis for the congressional decision in the 1970 Act to bar probation and court-ordered parole eligibility.

In the instant case, however, Congress would not be supporting the concept of finality by continuing the prohibition on parole. The Parole Board has never ruled on any of the pre-1971 offenders. And, as noted earlier, "neither the Bureau of Prisons nor the Board of Parole believes that it would impede the proper performance of their functions if they were required to consider narcotics offenders convicted under the prior statute eligible for parole under 18 U.S.C. § 4202."

Pipefitters v. *United States,* 407 U.S. 385 (1972), and similar cases are also readily distinguishable. In those cases, it was claimed that certain conduct ceased to be criminal under the new law. But Congress nevertheless had two legitimate reasons for requiring prosecution of persons who had violated the old law: first, to punish them for being lawbreakers and second, to deter people from violating a particular law whenever it seems likely that the law will be repealed in the near future.[17] Neither of these reasons apply to the instant case. Here the conduct proscribed under the old law is also proscribed under the new law. Indeed, as the Government forcefully points out, the more flexible penalty structure of the new law was designed to increase the likelihood that narcotics offenders would receive their just punishment.[18] Thus, the deterrence objective is inapplicable here because there was never even the remotest possibility that narcotics offenders would escape punishment under the new law. And the punishment objective is inapplicable here because all lawbreakers are being punished.

In short, in the instant case, unlike in *Bradley* or *Pipefitters,* the punishment sought to be imposed—the prohibition on parole—serves no legitimate purpose. In *Hamm* v. *City of Rock Hill,* 379 U.S. 306, 313 (1964), the Court stated that there was a general principle "of imputing to Congress an intention to avoid inflicting

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[17] This deterrence function is particularly crucial with respect to such legislation as price controls or rationing which everyone knows will be repealed in relatively short order. Unless it is clear that prosecutions will continue after repeal, many people will believe they can violate the law with impunity. See, *e.g., Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535 (1954); *Bowen* v. *United States,* 171 F.2d 533 (5th Cir. 1948).

[18] Brief for Petitioner, pp. 13-14.

punishment at a time when it can no longer further a legitimate purpose and would be unnecessarily vindictive." This principle certainly rises to constitutional dimensions: punishment without purpose is repugnant to due process.

The constitutional issue in this case can be framed in another way. If pre-1971 offenders are barred from parole, there are now two classes of offenders similar in every respect except that one class is eligible for parole and the other is not. As argued above, there is no legitimate objective served by the distinction between the two classes. Thus, the distinction violates the equal protection guarantees embodied in the Fifth Amendment. See *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

The contrast with *Marshall* v. *United States,* 91 U.S.L.W. 4121 (Jan. 9, 1974), is both sharp and instructive. In that case, all the Justices agreed that the statutory provision at issue, the NARA two felony exclusion, had a legitimate purpose—to exclude from NARA treatment those convicted persons less likely to be rehabilitated by such treatment. The question which divided the Court was whether the two felony exclusion was a sufficiently rational means towards that legitimate end. In the instant case, on the other hand, the continued prohibition on parole lacks a legitimate purpose and was not even expressly required by the statute.

Although the Court below did not specifically address the constitutional issue, in essence it adopted the position advanced here. The Court stated:

> . . . we can find *no rational basis* that would justify barring parole for persons convicted of crimes

committed before the Act's effective date, yet granting it to persons convicted of subsequent crimes. To the extent parole aids prisoner rehabilitation and consequently strengthens the tensile fabric of society, it is important that we avoid technical, *purposeless* construction which runs counter to the congressional plan to encourage prisoner rehabilitation." [19]

Similarly, the Fourth Circuit recently concluded

> It is obvious that Congress, in removing the ban on administrative parole for narcotic law offenders in the Comprehensive Act of 1970, was expressing a judgment that an intelligent program of rehabilitation, in which administrative parole should be an available tool, was the preferred method of dealing with such offenders. If that was the Congressional purpose, it is difficult to find any basis in that Act, *much less in reason or in fairness,* for treating differently prisoners whose narcotic law offenses took place before May 1, 1971 from those whose offenses occurred after that date. *We will not assume that Congress intended any such irrational purpose or intent.*[20]

In essence, both the Third and Fourth Circuits have concluded that the continued prohibition on parole cannot be squared with the rationality requirement of the due process clause of the Fifth Amendment. Particularly given Congress' failure to advance any reasons for continuing the prohibition, this Court should reach the same conclusion.

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[19] *Marrero* v. *Warden, Lewisburg, Pen.*, 483 F.2d 656, 663 (3rd Cir. 1973) (emphasis added).

[20] *Alvarado* v. *McLaughlin*, 386 F.2d 541, 544-45 (4th Cir. 1973) (emphasis added).

II. As a Matter of Statutory Construction, the Prohibition on Parole Contained in 26 U.S.C. § 7237(d) Does Not Survive the Enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

In *Bradley* v. *United States, supra,* the Court held that pre-1971 narcotics offenders are not entitled to probation or court-offered parole eligibility by virtue of the Drug Control Act of 1970. The Court relied solely on the saving clause in the new Act itself which provides that "Prosecutions for any violation occurring prior to the effective date of [the new statute] shall not be affected by the repeals or amendments made by [the statute] . . . or abated by reasons thereof." Pub. L. No. 91-513, § 1103(a). The Court held that the term "prosecution," when read in its "familiar legal sense," included sentencing and that sentencing included decisions as to probation and as to parole pursuant to 18 U.S.C. § 4208. 410 U.S. at 609. The Court concluded therefore that the prohibitions against probation and court-ordered parole eligibility were not abated by the new statute. 410 U.S. at 609-611.

The availability of parole under the general parole statute, 18 U.S.C. § 4202, raises different questions, as the *Bradley* Court recognized. 410 U.S. at 611. Such parole is decided upon by the Board of Parole, not a court, long after the sentence has been imposed. Clearly, such parole is not part of prosecution or sentencing as those terms are used in the "familiar legal sense." See *Morrisey* v. *Brewer,* 408 U.S. 471, 480 (1972), where the Court stated that "Parole arises after the end of the criminal prosecution, including imposition of sentence." Amicus contends, therefore, that the saving clause of the Drug Control Act does not save the provision of 26 U.S.C. § 7237(d) which bars parole under 18 U.S.C. § 4202.

The Government argues that parole under section 4202 can be regarded as part of prosecution and sentencing because the trial judge, in setting the sentence, in effect establishes when the offender will first become eligible for parole.[21] But this argument ignores the crucial fact that once the judge has imposed sentence, the offender can only obtain relief from a non-judicial body, the Parole Board, which considers post-sentence as well as pre-sentence information.[22] This fact has two significant consequences. First, it means that, in the "familiar legal sense," the offender is no longer involved in the judicial processes of prosecution and sentencing. Second, it means that the judge is not required to reopen his sentencing decision if it is held that the bar on parole is not saved by Section 1103(a). Thus, as amicus has argued above, no breach in the concept of finality is created if the bar on parole is lifted. *Bradley* is distinguishable precisely on this point.

The Government also relies on the general saving clause, 1 U.S.C. § 109. The language of the general saving clause may conceivably be broad enough to prevent abatement of the no-parole provision. But amicus contends that the general saving clause, which was not mentioned in the opinion of the Court in *Bradley,* is not applicable in this case because of the existence of the narrower saving clause in the Drug Control Act. In *Hertz* v. *Woodman,* 218 U.S. 204, 218 (1910), the Supreme Court stated "The repealing act here involved includes a saving clause, and if it necessarily, or by clear implication, conflicts with the general rule declared in [the general saving clause],

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[21] Brief for Petitioner, p. 19.

[22] See 28 C.F.R. 2 § 2, 2 § 14, 2 § 15, in 39 Fed. Reg. 26652-53 (1973).

the latest expression of legislative will must prevail." The Court then examined whether the saving clause in the repealing act "by plain implication cuts down the scope and operation of the general rule . . . ." *Ibid.* In the instant case, the saving clause of the repealing act, which speaks only of "prosecutions", cuts down the scope of the general saving clause, which speaks of "any penalty, forfeiture or liability." And since the saving clause of the new act is the latest expression of the legislative will, it must prevail.

Amicus emphasizes that there is no reason to regard the narrower language of the specific saving clause as mere accident. Congress enacts saving clauses frequently, and usually tracks the language of the general saving clause quite closely. See, *e.g.*, the saving clauses discussed in *Duffel* v. *United States,* 221 F.2d 523, 524 (D.C. Cir. 1954); *Hiatt* v. *Hilliard,* 180 F.2d 453, 455 (5th Cir. 1950); *United States* v. *Kirby,* 176 F.2d 101, 104 (2d Cir. 1949); and *Lovely* v. *United States,* 175 F.2d 312, 316 (4th Cir. 1949), all of which provide that any "liabilities" shall not be affected by repeal.

Moreover, as already noted, there is good reason why Congress might choose to treat abatement of a bar on probation and court-ordered parole eligibility differently from abatement of a bar on general parole. Abatement of the bar on general parole does not require numerous court rehearings and thus does not breach the concept of finality.

If there is any ambiguity as to the congressional intent, it should be resolved in favor of lenity. In *Bell* v. *United States,* 349 U.S. 81, 83 (1965), Mr. Justice Frankfurter, speaking for the Court, said:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the

> ambiguity shall be resolved in favor of lenity. And this is not out of any sentimental considerations, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presumption of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

Finally, as argued in Section I of this brief, an interpretation of the Drug Control Act which continues the prohibition on parole raises serious constitutional questions. This Court should avoid interpreting the statute in a manner which casts doubts on the constitutionality of Congress' action. See, *e.g., Crowell* v. *Benson,* 285 U.S. 22, 62 (1932).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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APR 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-831

WARDEN, LEWISBURG PENITENTIARY,

Petitioner,

v.

BENIGNO MARRERO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported as *United States ex rel. Marrero v. Warden*, 483 F.2d 656 (3d Cir. 1973). The opinion of the United States District Court for the Middle District of Pennsylvania is reported at 347 F. Supp. 99 (M.D Pa. 1972).

QUESTION PRESENTED

Whether the government can presently deny a federal prisoner parole consideration under 18 U.S.C. §4202,

despite the fact that the sole bar to parole eligibility was expressly repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, simply because the prisoner was convicted of a pre-repeal offense?

COUNTERSTATEMENT

On August 27, 1973, the Court of Appeals rendered its opinion upholding Benigno Marrero's habeas corpus application and directed that he be relieved of the unlawful restraint of parole ineligibility to which the government had asserted he was subject. In so doing, the Court vindicated his claim that parole eligibility under 18 U.S.C. §4202 was a question of a federal prisoner's status under the laws of the United States, not his sentence, that Section 4202 operated according to its terms unless some other existing law acted to render it ineffective, and that there was no such other law.

Mr. Marrero's Claim

Benigno Marrero was, and still is, confined in the United States Penitentiary at Lewisburg, Pennsylvania, serving a mandatory minimum sentence prescribed by the law in effect at the time of his conviction, May 27, 1970. The principal issue presented by his habeas application (App. [1] 6), according to Mr. Marrero, was whether the government's claim that a statute no longer in force, former 26 U.S.C. §7237(d), operated to render Section 4202 inapplicable to him.

Section 7237(d) had been repealed on May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970, §1101 (the "1970 Act"), an Act which

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[1] "App. " denotes page " " of the printed Appendix.

marked a fundamental change in the federal government's policy with respect to narcotics offenses.

Congress had specifically concluded that mandatory minimum sentences, without possibility of parole, the essence of prior narcotics legislation, served no useful purpose and, in fact, operated to hinder both law enforcement and effective control of drug abuse; indeed, Congress specifically recognized that an effective program of rehabilitation was essential if drug abuse were to be controlled. *See, e.g.*, 116 CONG. REC. 33616, 33631, 33648, 33649, 33650, 35056 (1970) (debates on the 1970 Act).

As the *Report of the House Interstate and Foreign Commerce Committee to Accompany H.R. 18583*, H.R. Rep. No. 1444, 91st Cong., 2d Sess. (1970), explicitly pointed out:

> [The 1970 Act] is designed to deal in a comprehensive fashion with the growing menance of drug abuse in the United States . . . by providing for an overall balanced scheme of criminal penalties involving drugs. 1970 U.S. CODE, CONG. & AD. NEWS 4567.
>
> With one exception . . . all mandatory minimum sentences are eliminated. *Id.* at 4570

Referring to the report of the Prettyman Commission, the Committee recognized that rehabilitation, not retribution, was the underlying objective of the Act. *Id.* at 4574-75. And the Attorney General of the United States had likewise spoken out against mandatory minimum sentences. *See* 116 CONG. REC. 33627 (1970) (remarks of Reps. Conyers and Eckhardt). In short, both the Legislative and Executive branches had rejected the underlying philosophy of prior narcotics legislation at the time that Section 7237(d) was repealed.

Benigno Marrero's conviction was under an earlier retributive, not rehabilitative, statutory scheme. His

sentence, on the first count, was directed by 21 U.S.C. §174. That section, a rather imprecise provision which addressed itself to many issues beyond sentence, stated:

> For provisions relating to sentencing, probation, etc., see Section 7237(d) of the Internal Revenue Code of 1954.

The second count was governed by Section 7237(a) of Title 26, the general penalty provision for narcotics violations. Because this was a second offense, "the penalty for which" was provided in 7237(a), Section 7237(d) applied.

Section 7237(d) stated, in part, that

> [i]n the case of a violation of a law relating to narcotic drugs section 4202 of title 18, United States Code . . . shall not apply.

Section 4202, the general parole statute, allowed federal prisoners to be released on parole after serving one-third of their terms of confinement.

But for Section 7237(d), Benigno Marrero would unquestionably be eligible for parole after serving one-third of his mandatory minimum sentence.[2] And the 1970 Act, which repealed Section 7237(d), marked a complete rejection by the Executive and Legislative branches of the mandatory minimum, no parole provisions of prior law embodied in Section 7237(d) and elsewhere, and the medieval concepts of punishment on which they were predicated. Certainly the repeal of Section 7237(d) allowed Section 4202 to operate according to its terms, thus making Benigno Marrero eligible for parole.

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[2] The government asserts that the sentencing court intended that Mr. Marrero remain in jail for more than 3-1/3 years. (Petitioner's Brief at 20 n.10.) Unfortunately, Respondent does not possess a crystal ball with which to test this assertion; the record certainly contains no facts to support it.

The Government's Claim

The resolution of this case depends upon an interpretation of two "savings" statutes, Section 1103(a) of the 1970 Act and 1 U.S.C. §109, and of their effect, if any, on Sections 4202 and 7237(d). The issue is more than one of mere semantics, for continuation of Section 7237(d)'s bar to parole eligibility under 18 U.S.C. §4202 would be in express derogation of the principles which Congress has directed are to govern our national policy toward drug abuse.

The government asserts[3] that the two "savings" statutes render the 1970 Act's repeal of Section 7237(d) ineffective. It makes this contention despite the fact that denying parole eligibility to Benigno Marrero would contravene our national policy regarding rehabilitation of drug offenders, the fact that there are only 800 prisoners in Mr. Marrero's position (*see Baratta, et al. v. Sigler, et al.*, No. A-725, Appellees' Application, Annex C), and the fact that parole is an important rehabilitative tool.

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[3]The government's principal argument in the Court of Appeals did not address the question of Section 7237(d). Rather, the government argued that Benigno Marrero had elected the wrong remedy, that his habeas application was premature because he had not filed a motion under 28 U.S.C. §2255 and, thus, that the district court lacked jurisdiction to consider his claim. Although it purports to preserve this jurisdictional issue in its brief to this Court through a footnote reference (Petitioner's Brief at 10 n.4). even though it was not in the petition for certiorari, the government has finally elected to address the substantive issue presented by this case. But it is interesting to note that in *Baratta v. Sigler*, Nos. 73-2111-19 (3d. Cir.), the government denied that any jurisdictional issue was presented by the *Marrero* case and represented to the Third Circuit that "the only issue remaining for decision by the Supreme Court is the merits of Marrero's claim." Reply to Appellees' Response to Appellant's Motion to Continue Filing ¶¶ 2 & 3.

Furthermore, the government even admits that considering Mr. Marrero and other prisoners in his position for parole would not impede the U.S. Parole Board or the Bureau of Prisons in the proper exercise of their functions (Petitioner's Brief at 8).

The government's argument has been rejected, not only by the Third Circuit in this case, but, in other well-reasoned opinions, by the Courts of Appeals for four other circuits. *Alvarado v. McLaughlin*, 486 F.2d 541 (4th Cir. 1973); *Amaya v. U.S. Board of Parole*, 486 F.2d 940 (5th Cir. 1973); *United States v. Marshall*, 485 F.2d 1062 (D.C. Cir. 1973); *United States v. McGarr*, 461 F.2d 1 (7th Cir. 1972); *see Arias v. United States*, 484 F.2d 577, 578-79 (7th Cir. 1973).

Moreover, the Second Circuit, which was the first Court of Appeals to accept the government's position, has reconsidered and retracted its earlier decisions on the issue. *United States v. Huguet*, 481 F.2d 888, 890-92 (2d Cir. 1973). Indeed, only one Court of Appeals can realistically be said to now stand opposed to Mr. Marrero's position—the Tenth Circuit. *Perea v. United States Board of Parole*, 480 F.2d 608 (10th Cir. 1973). As is shown below, the government and *Perea* are wrong and the shared conclusion of the overwhelming majority of the Courts of Appeals which have considered the issue is correct.

SUMMARY OF ARGUMENT

Parole eligibility under Section 4202 is a legislative grant not a judicial one. Parole eligibility flows from Section 4202 itself and applies to all persons specified by the statute. Consequently, the repeal of Section 7237(d), the only bar to parole eligibility under Section 4202, allowed Benigno Marrero to become eligible for parole on

June 20, 1973, the date on which he served one-third of his sentence.

In its attempt to avoid this inevitable result, the government presents a confusing, intertwined series of arguments concerning Sections 1103(a) and 109, the terms "prosecution" and "penalty", and extracted legislative comments. In an attempt to bring order to this chaos, Respondent will separately address the operation and effect of Sections 1103(a) and 109. When correctly viewed, it becomes apparent that neither Section 1103(a) nor Section 109 operates to revitalize the repealed bar to parole eligibility under Section 4202.

Section 1103(a) was intended only to save "prosecutions" under prior law. Parole eligibility under Section 4202 is, in no sense, part of a "prosecution". And the mere fact that a prisoner is sentenced during a "prosecution" and that Section 4202 applies to prisoners serving a "sentence" is of no significance. Parole eligibility under Section 4202 is a creature of statute, not of a determination by a trial court during the course of a "prosecution". Consequently, Section 1103(a) does not operate to render the repeal of Section 7237(d) ineffective.

Section 109, intended to preclude "technical abatements"[4] and designed only to provide general rules for statutory construction, also fails to render Section 7237(d)'s repeal ineffective. Actually, Section 109 should not be applied to the 1970 Act at all since that Act contained its own "savings" provision. And the language of Section 109 itself, which preserves "prosecutions" and prevents the extinguishment of "penalties", does not bar parole under Section 4202.

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[4] In fact, this is the same as preserving "prosecutions".

The term "prosecution", obviously, is no bar in Section 109 since it is not one in Section 1103(a). The term "penalty", which must be read consistent with "prosecution", includes only the imposed sentence and other acts of the sentencing court. Parole eligibility under Section 4202 is not determined by the sentencing court and release on parole is not a release or extinguishment of sentence. Consequently, Section 109 is not a bar.

Finally, if there is doubt about how to apply Sections 109 and 1103(a) to Sections 4202 and 7237(d), the doubt should be resolved in Benigno Marrero's favor, since prisoners should receive the benefit of any ambiguity in a statute's construction. Such a resolution necessitates Mr. Marrero's being considered eligible for parole under Section 4202.

ARGUMENT

I.

THE 1970 ACT'S REPEAL OF 26 U.S.C. §7237(d) WAS NOT RENDERED INEFFECTIVE BY SECTION 1103(a) OF THE 1970 ACT

The key "savings" statute for purpose of this case is Section 1103(a). The critical language in that section is:

> Prosecutions for any violation of law occurring prior to [May 1, 1971] shall not be affected by the repeals . . . [made by the 1970 Act] . . . , or abated by reason thereof.

Only if ineligibility for parole under Section 4202 is part of a "prosecution", as that term is used in Section 1103(a), can that section create a bar against Mr. Marrero. *See also* H.R. Rep. No. 91-1444, 1970 U.S. CODE, CONG. & AD. NEWS 4647.

The fact of the matter is that the term "prosecution" does not preclude parole consideration under Section

4202. Parole under Section 4202 is an act of legislative grace. *See United States v. Frederick*, 405 F.2d 129, 133 (3d Cir. 1968); *O'Neill v. United States*, 315 F. Supp. 1352, 1354 (D. Minn.), *aff'd*, 438 F.2d 1236 (8th Cir. 1970); *Marchand v. Director*, 296 F. Supp. 532, 534 (D. Mass. 1969), *vacated on other grounds*, 421 F.2d 331 (1st Cir. 1970). Unlike accelerated parole or probation, *see* 18 U.S.C. §§4208 & 3651, Section 4202 parole flows from the language of the statute itself; it cannot be affected by the action of a trial judge, *see* 18 U.S.C. §4208, during the course of a "prosecution".

As this Court held in *Bradley v. United States*, 410 U.S. 605, 611 (1973), a "prosecution" terminates when sentence is imposed. *See Korematsu v. United States*, 319 U.S. 432 (1943); *Berman v. United States*, 302 U.S. 211, 212 (1937). And Section 1103(a) applies only to events prior thereto or "so close in time" that the events and the act of sentencing are "essentially a single proceeding." *Bradley v. United States*, 410 U.S. at 609 n.4. Parole under Section 4202 occurs long after sentence has been imposed and the "prosecution" has terminated, *id.* at 611 n.6, and is therefore not a part of "prosecution", *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

Indeed, were this not correct, this Court would necessarily have reached the Section 4202 issue in *Bradley*, for it is well-established law that all matters pertaining to the propriety of "sentence"[5] can be considered on the direct appeal of a criminal conviction; it is equally well-established that such matters can also be raised by motion to correct sentence in the trial court,

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[5]The government admits that if "prosecution" bars parole under Section 4202 then parole is part of "sentence" and is reviewable as such. (Petitioner's Brief at 10 n.4.)

see Fed. R. Crim P. 35. And if parole eligibility under Section 4202 is determined by the sentencing process, a full panoply of Fifth and Sixth Amendment safeguards would necessarily be required at parole hearings, because they too would be part of that process, *see Mempa v. Rhay*, 389 U.S. 128 (1967), not the lesser safeguards approved by this Court in *Morrissey*.

Because parole under Section 4202 is dependent solely upon the operation of the statute itself, the fact that Section 4202 applies to prisoners serving "sentences" imposed during a "prosecution" is irrelevant. *Alvarado v. McLaughlin*, 486 F.2d 541, 543-44 (4th Cir. 1973); *Amaya v. U.S. Board of Parole*, 486 F.2d 940, 942 (5th Cir. 1973); *United States v. Marshall*, 485 F.2d 1062, 1065 (D.C. Cir. 1973); *United States ex rel. Marrero v. Warden*, 483 F.2d 656 (3d Cir. 1973); *United States v. McGarr*, 461 F.2d 1, 4-5 (7th Cir. 1972). No decision made by the sentencing court will be altered by considering Mr. Marrero for release on parole. And, as is shown in Point II, *infra*, even releasing Mr. Marrero on parole would not change his sentence or any decision made during the course of his "prosecution".

In short, the term "prosecution" used in Section 1103(a) does not operate to freeze the statutory scheme by which the rehabilitative parole mechanism of Section 4202 is implemented. Section 7237(d) was expressly repealed and Section 1103(a) does not resurrect it.

II.

SECTION 109 DOES NOT VITIATE THE 1970 ACT'S REPEAL OF SECTION 7237(d)

The only remaining possible bar to considering Mr. Marrero for parole under Section 4202 is 1 U.S.C. §109,

the general federal "savings" statute. Section 109 states:

> *The repeal of any statute shall not have the effect to release or extinguish any penalty*, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, *and such statute shall be treated as still remaining in force for the purpose of sustaining any proper* action or *prosecution* for the enforcement of such penalty, forfeiture, or liability. 1 U.S.C. § 109 (emphasis added).

The language of this statute indicates that only if allowing Mr. Marrero to be considered for parole under Section 4202 would "release or extinguish" a "penalty", or would result in a "prosecution" not being sustained, would it be a bar. And, as is shown below, Section 4202 parole is not part of a "prosecution" and its availability is not a release or extinguishment of a "penalty". Consequently, Section 109 does not revive Section 7237(d).

But the proper inquiry goes beyond this. Section 109 is also not applicable because the 1970 Act contained its own "savings" provision, Section1103(a). Section 109, moreover, was never intended to erect substantial impediments to effectuating remedial statutes; it was designed only as a simple expedient for avoiding common law "technical abatements". For these reasons as well, Section 109 is no bar to Section 4202 parole.

Section 109–An Expedient for Avoiding Technical Abatements

History reveals that Section 109 was only an expedient and was not intended to make fundamental changes in the law. Section 109 is simply the current codification of Section 4 of Chapter 71 of the Act of February 25, 1871, 16 Stat. 432. *See Great Northern Ry. v. United States*, 208 U.S. 452, 465 (1908). And Section 4 originated in

H.R. 1351, 41st Cong., 2d Sess. (1870), a resolution designed to prescribe the form of enacting and resolving clauses in statutes and to provide general rules of construction.

As the debates on H.R. 1351 make clear, the sole purpose of the 1871 act was to make subsequent statutes less cumbersome, not to make significant changes in the law. *See* CONG. GLOBE, 41st Cong., 2d Sess. 2464-67 (1870); CONG. GLOBE, 41st Cong., 3d Sess. 775-78 (1871). Indeed, the principal debate on H.R. 1351 centered on the wording of enacting clauses and the definition of terms such as "lunatic" and "insane". Obviously, Section 4 of the 1871 act, which was not the subject of Congressional debate, was not meant to substantially change the law.

At common law, the repeal of a statute caused a "technical abatement"[6] of proceedings undertaken pursuant to that statute, unless the repealing statute contained a "savings" provision. *E.g., United States v. Tynen,* 78 U.S. (11 Wall.) 88 (1870). But the inclusion of such provisions, along with long definitional sections of terms common to almost all statutes, made legislation cumbersome.

All that Section 4, and thus Section 109, did was obviate the necessity for including a "savings statute" in every repealing statute in order to preclude "technical abatements". *Hamm v. City of Rock Hill,* 379 U.S. 306, 314 (1964); *see Pipefitter's Local Union No. 562 v.*

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[6] The common law principle that

> the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefor after said repeal, unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing such prosecution. *United States v. Reisinger,* 128 U.S. 398, 401 (1888).

United States, 407 U.S. 385, 434-35 (1972). Eligibility for parole under Section 4202 is certainly not a consequence of a "technical abatement". Thus, for that reason alone, Section 109 should not be applied to revive Section 7237(d) as a bar to parole eligibility. *Amaya v. U.S. Board of Parole*, 486 F.2d at 942; *United States ex rel. Marrero v. Warden*, 483 F.2d at 663.[7]

Section 109 is a General Rule of Construction, thus Superseded by Different Provisions in Subsequent Law

Section 109, moreover, simply provides a general rule for statutory construction. A general rule certainly should not be applied in a case in which Congress has provided a specific, different provision.

The 1970 Act contains its own "savings" provision, Section 1103(a), a section specifically intended to preserve "prosecutions" and nothing more. Consequently this express directive should supersede the general "savings" statute, Section 109.

This Court has considered the question of how Section 109 operates when a subsequent law contains its own clause on two occasions, *Hertz v. Woodman*, 218 U.S. 205 (1910), and *Great Northern Ry. v. United States*,

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[7]Indeed, the only cases in which this Court has applied the general "savings" statute were those in which it operated to avoid a technical abatement. *Pipefitter's Local Union No. 562 v. United States*, 407 U.S. 385 (1972); *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *Great Northern Ry. v. United States*, 208 U.S. 452 (1908); *United States v. Reisinger*, 128 U.S. 398 (1888). Although this Court did discuss Section 109 in *Hertz v. Woodman*, 218 U.S. 204 (1910), a tax case, it was not applied. *Hertz* thus may stand for the proposition that Section 109 can apply to cases other than "technical abatements" if the conduct concerned falls necessarily within the language of the section. But the history of Section 109 casts doubt upon the validity of such an interpretation.

208 U.S. 452 (1908). On both occasions, this Court enunciated the general proposition that a different provision in a subsequent law supersedes the general "savings" statute. *Hertz v. Woodman*, 218 U.S. at 218; *Great Northern Ry. v. United States*, 208 U.S. at 465.

In *Hertz*, however, this Court found it unnecessary to determine whether Section 109's predecessor applied, because the conduct complained of was within the specific savings statute. And, in *Great Northern*, this Court found only that a statute which allowed pending prosecutions to continue was not so different from the general statute as to preclude a prosecution which had not been begun prior to the repeal. Thus, although *Hertz* and *Great Northern* contain general explanations of how the general "savings" statute operates, neither is directly dispositive of this case.

Section 1103(a) by its very terms applies to all "violations of law" occurring prior to the effective date of the 1970 Act. Unlike the statute in *Great Northern*, it expressly applies to both pending "prosecutions" and "prosecutions" not yet begun. This fact, that Section 1103(a) comprehends all time periods in which any "prosecutions" under prior law could occur, is certainly a justification for its superseding Section 109. And, when Section 109 is viewed in its historical perspective, it becomes obvious that there is no need for Section 109 to operate in a conflicting or cumulative fashion.

Section 1103(a) clearly superseded Section 109.[8] Since 1103(a) did not revive Section 7237(d)'s bar to Section 4202 parole, Section 109 certainly cannot be found to have done so.

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[8] In fact, any other interpretation would render Section 1103(a) superfluous, thus implying that Congress acted irrationally.

The Express Provisions of Section 109 Do Not Operate to Reinstate the Repealed Bar to Section 4202 Parole

Even if Section 109 were applicable to Mr. Marrero, it still would not bar parole eligibility under Section 4202. Parole under that section is not within the purview of the language of Section 109, which applies only to "prosecutions" and to releasing or extinguishing "penalties".

Certainly the word "prosecution" as used in Section 109 does not bar Section 4202 parole. "Prosecution" in Section 109 is identical to that in Section 1103(a). Since Section 1103(a) is not a bar to parole, the term "prosecution" in Section 109 also is not.

The only remaining question under Section 109 is whether parole eligibility under Section 4202 is a *release* or *extinguishment* of a "penalty". But, for several reasons, ineligibility for Section 4202 parole is not a "penalty" as that term is used in Section 109.

First, Section 109 is written in terms of "sustaining any . . . prosecution" and of not having "the effect to release or extinguish any penalty". These terms were written in parallel; the first covering "prosecutions" not yet completed or undertaken and the second covering events that had already occurred. Consequently, "penalty" must be read consonant with "prosecution", each operating to save the same things. *See United States v. McGarr*, 461 F.2d at 4. Since "prosecution" does not preclude Section 4202 parole, neither should the term "penalty".

Second, the proper meaning of "penalty" in a criminal proceeding is the imposed "sentence". *Alvarado v. McLaughlin*, 486 F.2d at 544; *Amaya v. U.S. Board of Parole* 486 F.2d at 942-43; *United States ex rel. Marrero v. Warden*, 483 F.2d at 663. It should not be interpreted to mean the manner in which the sentence is executed.

Since parole involves the manner by which "sentence" is executed, not the sentence itself, *Halprin v. United States*, 295 F.2d 458 (9th Cir. 1961), parole under Section 4202 is not precluded by the term "penalty".

In fact, even releasing Mr. Marrero on parole would not alter his sentence, for parole "is a far different thing from reduction of sentence". *O'Neal v. United States*, 332 F.2d 152, 154 (9th Cir. 1964). Parole is not a forgiving, *Ex parte Rupert*, 38 F. Supp. 152, 153 (N.D. Tex. 1941), and a parolee "is not free of his sentence", *United States ex rel. Gutterson v. Thompson*, 47 F. Supp. 150, 151 (E.D.N.Y. 1942), *aff'd*, 135 F.2d 626 (2d Cir. 1943), but continues to be in custody under that sentence, *Padilla v. Lynch*, 398 F.2d 481, 482 (9th Cir. 1968). Thus parole eligibility under Section 4202 cannot even affect the "penalty", *i.e.*, sentence, imposed upon Mr. Marrero;[9]

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[9] The government cites *United States v. Ross*, 464 F.2d 376 (2d Cir. 1972), *cert. denied*, 410 U.S. 990 (1973), for the contrary proposition. (Petitioner's Brief at 12 n.5.) But it fails to reveal that the opinion in *Ross* was withdrawn by the opinion in *Huguet*. Also, after his conviction, Mr. Ross petitioned for a writ of habeas corpus declaring that he was eligible for parole under Section 4202. The writ was granted, *United States ex rel. Ross v. Warden*, No. 73-156-E (E.D. Ill., Oct. 19, 1973), the government elected not to appeal, and Mr. Ross's parole hearing will be held soon.

The government's argument that ineligibility for Section 4202 parole was intended as a "penalty" under Section 109 rests largely on cases decided under Rule 11 of the Federal Rules of Criminal Procedure. (Petitioner's Brief at 12 n.5.) The fact that parole ineligibility may be a "consequence" of which an accused must be advised, pursuant to Fed. R. Crim. P. 11, prior to accepting a plea of guilty, does not mean that it is a "penalty" for purposes of Section 109. Not only does the language of Section 109 differ from that of Rule 11, but the two were designed to accomplish different purposes.

certainly it does not "release or extinguish" that "penalty".

Third, numerous collateral restraints unrelated to a prosecution flow from a conviction.[10] The construction which the government urges be placed on Section 109 would mean that all such restraints would be saved; but,[11] such a construction would be both impractical and unnecessarily harsh.

In conclusion, it is clear that Section 109 is not applicable in the present case, since the 1970 Act contains its own specific savings provision. Indeed, Section 109, which was originally enacted solely to obviate the need for a specific savings clause in order to

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The government's Section 109 "policy" argument, concerning 21 U.S.C. §848 (Petitioner's Brief at 14-15), is illogical. Legislative application of that section to any person not convicted of that specific offense after verdict of a trier of fact would be both an *ex post facto* law and a bill of attainder. There is no indication that Congress intended either, and it is inconceivable that it could have.

[10]For example, pursuant to 18 U.S.C. §922(h)(1), a person convicted of a crime punishable by a term of imprisonment of more than one year may not possess a rifle, pistol, or other firearm, and under subsection (g)(1), he may not ship any firearms. Under 50 U.S.C. App. §456(m) such a person would not be subject to the draft; and, under 24 U.S.C. §51, he is not allowed to be admitted to the Old Soldiers' Home.

[11]Thus, for example, if someone were convicted in June of 1971 of possession of one marijuana cigarette in 1970 (then a felony under former Sections 4744(a) and 7237(a) of the Internal Revenue Code of 1954), and if on January 1, 1974, 18 U.S.C. §922 were amended to state that it applied to felons who had committed crimes of violence, that person nevertheless could not get a job selling shotguns as a clerk in a department store in 1974. Congress would be required to make an explicit statement in the amending statute that the amendment specifically included persons convicted under prior law for him to hold that job.

prevent common law technical abatement, was neither intended to apply to the present case nor would operate so as to revive Section 7237(d)'s repealed bar to Section 4202 parole.

III.

THE RELEVANT STATUTORY PROVISIONS MUST BE CONSTRUED SO AS TO AVOID INJUSTICE

In determining the effect of Section 1103(a) and Section 109 on the repeal of Section 7237(d)'s bar to parole eligibility, a cardinal rule of statutory construction must be obeyed. Any construction which would result in injustice must be avoided. *Knowlton v. Moore*, 178 U.S. 41, 77 (1900); *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 483 (1868); *Grier v. Kennan*, 64 F.2d 605, 607 (8th Cir. 1933).

Furthermore, the various "savings" provisions themselves should always be construed so as "to avoid inflicting punishment at a time when it can no longer serve any legislative purpose, and would be unnecessarily vindictive." *Hamm v. City of Rock Hill*, 379 U.S. at 313. The repeal of the no parole provision of Section 7237(d) thus must be viewed broadly so as to effect its rehabilitative purpose. *See Camunas v. New York & P.R.S.S. Co.*, 260 F. 40, 52 (1st Cir. 1919).

The government's argument, that the various "savings" provisions operate to preserve Section 7237(d) so as to make Benigno Marrero ineligible for parole, runs counter to these settled rules of statutory construction. Under the rationale urged by the government, the stated Congressional purpose of rehabilitation and flexible treatment for narcotics offenders should be ignored where the offense occurred prior to May 1, 1971, thereby creating an arbitrary and unjust distinction between persons con-

victed of offenses which occurred prior to that date and those which occurred afterward.

This assertion was properly rejected by the Court of Appeals:

> We read §7237(d)'s preclusion of parole as a dated legislative judgment as to the manner by which the actual penalty, i.e., the prison sentence, should be effectuated. To read it otherwise would preclude carrying out the apparent congressional judgment, in repealing the parole ban, that the rehabilitative goals of the criminal justice system will be furthered by parole. Moreover, we can find no rational basis that would justify barring parole for persons convicted of crimes committed before the Act's effective date, yet granting it to persons convicted of subsequent crimes. To the extent parole aids prisoner rehabilitation and consequently strengthens the tensile fabric of society, it is important that we avoid technical, purposeless construction which runs counter to the congressional plan to encourage prison rehabilitation. *United States ex rel. Marrero v. Warden*, 483 F.2d at 663; *accord, Amaya v. U.S. Board of Parole*, 486 F.2d at 942-43; *Alvarado v. McLaughlin*, 486 F.2d at 544-45.

It is clear that the only method of construing the relevant statutes so as to avoid injustice and to effect the Congressional purpose of rehabilitation is to hold that neither Section 1103(a) nor Section 109 reinstated the bar to Section 4202 parole that the 1970 Act expressly repealed. That construction, which has already been adopted by five Courts of Appeals, requires an affirmance of the Judgment of the Third Circuit in this case.

CONCLUSION

The 1970 Act crystallizes the Congressional approach towards rehabilitation of narcotic addicts, which surfaced in 1966 with NARA, and had been carried forward in a number of statutes widening the rehabilitation possibilities available to all concerned—to those merely charged with crime, to those convicted and awaiting sentence, and to those already sentenced. The statute marks recognition of the need for integration of law enforcement with treatment and rehabilitation programs reflecting a "strong consensus" that these are not only interrelated but can have enhancing effects on each other. The broad authority of the Parole Board to set conditions to avoid relapse of former narcotic addicts, and set appropriate conditions on the parolee includes authority *e.g.*, to require adherence to such regimen and surveillance as may be appropriate in the light of rehabilitative treatment and programs available in the community and its treatment centers. These considerations of policy powerfully reinforce the conclusion provided by the text of the law and the *Bradley* opinion, that the 1970 law removes, as of the effective date of May 1, 1971, the restraint that prohibited granting of parole under 18 U.S.C. §4202 to persons convicted and sentenced under earlier Federal laws governing narcotic violations. *United States v. Marshall*, 485 F.2d at 1066 (footnotes omitted).

For the foregoing reasons, the Judgment of the United States Court of Appeals for the Third Circuit should, in all respects, be affirmed.

Respectfully submitted,

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Dated: March 21, 1974

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WARDEN, LEWISBURG PENITENTIARY *v.* MARRERO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73–831. Argued April 29, 1974—Decided June 19, 1974

The Comprehensive Drug Abuse Prevention and Control Act of 1970, which became effective May 1, 1971, makes parole under the general parole statute, 18 U. S. C. § 4202, available for almost all narcotics offenders. Respondent, who had been sentenced before May 1, 1971, and was ineligible for parole under 26 U. S. C. § 7237 (d), which was repealed by the 1970 Act, sought habeas corpus in the District Court, claiming parole eligibility when one-third of his sentence had been served. The District Court denied relief on the ground that the prohibition on parole eligibility under 26 U. S. C. § 7237 (d) had been preserved by § 1103 (a) of the 1970 statute (which provides that "[p]rosecutions" for violations before May 1, 1971, shall not be affected by repeals of statutory provisions) and by the general saving clause, 1 U. S. C. § 109 (which provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute . . ."). The Court of Appeals reversed. *Held:*

1. Section 1103 (a) of the 1970 statute bars the Board of Parole from considering respondent for parole under 18 U. S. C. § 4202, since parole eligibility, as a practical matter, is determined at the time of sentencing, and sentencing is a part of the concept of "prosecution," saved by § 1103 (a), *Bradley* v. *United States*, 410 U. S. 605. Pp. 4–6.

2. The Board of Parole is also barred by the general saving clause from considering respondent for parole, since it is clear that Congress intended ineligibility for parole in § 7237 (d) to be treated as part of the offender's "punishment," and therefore the prohibition against the offender's eligibility for parole under 18

Syllabus

U. S. C. § 4202 is a "penalty, forfeiture, or liability" under the saving clause. Pp. 6–10.

483 F. 2d 656, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-831

Warden, Lewisburg Penitentiary, Petitioner, *v.* Benigno Marrero. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 19, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A now repealed statute, 26 U. S. C. § 7237 (d),[1] provided, *inter alia*, that certain narcotics offenders sentenced to mandatory minimum prison terms should be ineligible for parole under the general parole statute, 18 U. S. C. § 4202.[2] Section 7237 (d) was repealed, effective May 1,

[1] 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V) provided:

"Upon conviction—

"(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

"(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply."

[2] 18 U. S. C. § 4202 provides:

"A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such

1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1292, which makes parole under § 4202 available for almost all narcotics offenders. The question for decision in this case is whether the parole ineligibility provision of 26 U. S. C. § 7237 (d) survives the repealer, so that a narcotics offender who has served more than one-third of a sentence imposed before May 1, 1971, remains ineligible for parole consideration under 18 U. S. C. § 4202.

Respondent was convicted of narcotics offenses and, as a second offender, was sentenced before May 1, 1971, to concurrent terms of 10 years imprisonment on each of two counts. 450 F. 2d 373, 374–375 (1971).[3] On February 24, 1972, respondent sought habeas corpus in the United States District Court for the Middle District of Pennsylvania claiming that, since 26 U. S. C. § 7237 (d) had been repealed, he should be eligible for consideration for parole under 18 U. S. C. § 4202 when one-third of his sentence had been served. The District Court, in an unreported decision, denied relief on the ground that the prohibition on parole eligibility of 26 U. S. C. § 7237 (d) had been preserved by § 1103 (a) of the 1970 statute [4] and by 1 U. S. C. § 109.[5] The Court

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term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years."

[3] Respondent was convicted of violating 21 U. S. C. § 173 (1964 ed.) and 26 U. S. C. §§ 4701, 4703, 4704 (a), and 4771 (a) (1964 ed.). His sentences were imposed under 21 U. S. C. § 174 and 26 U. S. C. § 7237 (a). Section 174 explicitly incorporated the provisions of 26 U. S. C. § 7237 (d), which was directly applicable to the sentence imposed under § 7237 (a).

[4] Section 1103 (a) provides:

"Prosecutions for any violation of law occurring prior to the effective date of [the Act] shall not be affected by the repeals or amendments made by [it] . . . or abated by reason thereof."

[5] 1 U. S. C. § 109 provides in relevant part:

of Appeals for the Third Circuit reversed, holding that neither § 1103 (a) of the 1970 statute nor 1 U. S. C. § 109 continued the prohibition on eligibility for parole consideration in 26 U. S. C. § 7237 (d). 483 F. 2d 656 (1973).[6] We granted certiorari to resolve a conflict among the Courts of Appeals.[7] 414 U. S. 996 (1973). We agree with the District Court and reverse the judgment of the Court of Appeals.

Bradley v. *United States*, 410 U. S. 605, 611 (1973), expressly reserved decision of the question now before us. *Bradley* involved the conviction and sentencing after May 1, 1971, of offenders who committed narcotics offenses before that date. We held that sentencing is a part of the concept of "prosecution" and therefore that the provision of § 1103 (a) of the 1970 Act that "[p]rosecutions for any violation of law occurring . . . [before

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"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

[6] The mandate was released before the Circuit Justice signed a stay. The stay was treated, however, as staying all proceedings under the mandate. Respondent's motion to dismiss the writ of certiorari as moot is therefore denied.

[7] The Courts of Appeals for the Second and Tenth Circuits have held that narcotics offenders are ineligible for parole. *United States* v. *De Simone*, 486 F. 2d 1196 (CA2 1972) (but see *United States* v. *Huguet*, 481 F. 2d 888 (CA2 1973); *Perea* v. *Board of Parole*, 480 F. 2d 608 (CA10 1973). In addition to the Court of Appeals for the Third Circuit, in this case, the Courts of Appeals for the Fourth, Fifth, Seventh and District of Columbia Circuits have held that narcotics offenders are eligible for parole. See *Alvarado* v. *McLaughlin*, 486 F. 2d 541 (CA4 1973); *Amaya* v. *Board of Parole*, 486 F. 2d 940 (CA5 1973); *United States* v. *McGarr*, 461 F. 2d 1 (CA7 1972); *United States* v. *Marshall*, — U. S. App. D. C. —, 485 F. 2d 1062 (1973).

May 1, 1971] shall not be affected" by the repeal of 26 U. S. C. § 7237 (d), barred the sentencing judge from suspending the sentences of, or granting probation to, the *Bradley* petitioners and also barred him from making them eligible for early parole, before they had served one-third of their sentences, under 18 U. S. C. § 4208 (a).[8] Although stating in a footnote that "[t]he decision to grant parole under [18 U. S. C.] § 4202 lies with the Board of Parole, not with the District Judge, and must be made long after sentence has been entered and the prosecution terminated," we concluded that "[w]hether § 1103 (a) or the general saving statute, 1 U. S. C. § 109, limits that decision is a question we cannot consider in this case." 410 U. S., at 611, n. 6.

I

We hold that § 1103 (a) bars the Board of Parole from considering respondent for parole under 18 U. S. C. § 4202. In concluding in *Bradley* that ineligibility for early parole under 18 U. S. C. § 4208 (a) was part of the "prosecution," we reasoned that, since a District Judge's decision to make an offender eligible for early parole is made at the time of entering a judgment of conviction,

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[8] 18 U. S. C. § 4208 (a) provides:

"(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoners shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine."

the decision was part of the sentence and therefore also part of the "prosecution." 410 U. S., at 611.

Similarly, a pragmatic view of sentencing requires the conclusion that parole eligibility under 18 U. S. C. § 4202 is also determined at the time of sentence. Since, under § 4202, an offender becomes eligible for parole after serving one-third of his sentence, see n. 2, *supra*, parole eligibility is a function of the length of the sentence fixed by the District Judge. Although, of course, the precise time at which the offender becomes eligible for parole is not part of the sentence, as it is in the case of § 4208 (a), it is implicit in the terms of the sentence. And because it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, parole eligibility can be properly viewed as being determined—and deliberately so—by the sentence of the District Judge. Ineligibility for parole under § 4202 is thus determined at the time of sentencing and, under the teaching of *Bradley*, is part of the "prosecution" saved by § 1103 (a).

We therefore reject respondent's argument that our *Bradley* footnote should be read as holding that, because the decision to grant parole under § 4202 is for the Board of Parole, not the trial judge, and is arrived at after the sentence has been entered and the prosecution has come to an end, the parole eligibility decision is not part of the "prosecution" for purposes of § 1103 (a). Apart from the obvious answer that the Court could not reasonably be thought to have decided in a footnote a question "on which" we said in the text, "we express no opinion," 410 U. S., at 611, respondent's reliance upon the footnote both proves too little and too much. It proves too little, be-

cause the fact that the Board of Parole, not the sentencing judge, finally determines whether and when an offender should be released on parole does not undercut our conclusion that the District Judge, at the time of sentencing, determines when the offender will become *eligible* for consideration for parole and the Board's action simply implements that determination.[9] It proves too much, because, if—as the respondent would have it—the proper focus is upon the time at which release on parole is actually granted or denied, the parole decision, whether made under 18 U. S. C. § 4208 (a) or 18 U. S. C. § 4202, is made long after the "prosecution" terminates; for under both provisions, the Board of Parole ultimately decides whether and when the offender is to be released. But, as previously mentioned, we held in *Bradley* that the District Judge's decision to deny early parole under § 4208 (a) was part of the sentence, and therefore part of the "prosecution."

II

We hold further that the general saving clause, 1 U. S. C. § 109, also bars the Board of Parole from considering respondent for parole.[10]

Congress enacted its first general saving provision, 16 Stat. 432 (1871), to abolish the common-law presump-

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[9] The statement in *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972), that "[p]arole arises after the end of the criminal prosecution, including imposition of sentence" was addressed to the decision determining the time of *release* on parole as distinguished from the decision determining *eligibility*.

[10] Respondent argues that, since the 1970 Act contains its own saving clause, § 1103 (a), that specific directive should be read to supersede the general clause § 109. But only if § 1103 (a) can be said by fair implication or expressly to conflict with § 109 would there be reason to hold that § 1103 (a) superseded § 109. See *Great Northern R. Co.* v. *United States*, 208 U. S. 452, 465–466 (1908). We find no conflict.

tion that the repeal of a criminal statute resulted in the abatement of "all prosecutions which had not yet reached final disposition in the highest court authorized to review them." *Bradley* v. *United States, supra,* at 607; see *Bell* v. *Maryland,* 378 U. S. 226, 230 (1964). Common-law abatements resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties. See *Bradley* v. *United States, supra,* at 607–608; *Lindzey* v. *State,* 65 Miss. 542 (1888); *Hartung* v. *People,* 22 N. Y. 95 (1860); Note, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 121–126 (1972). To avoid such abatements—often the product of legislative inadvertence—Congress enacted 1 U. S. C. § 109, the general saving clause, which provides in pertinent part that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute." See n. 5, *supra.* The determinative question is thus whether the prohibition of 26 U. S. C. § 7237 (d) against the offender's eligibility for parole under 18 U. S. C. § 4202 is a "penalty, forfeiture, or liability" saved from release or extinguishment by 1 U. S. C. § 109.[11]

[11] The Court of Appeals, relying on statements in opinions of this Court that § 109 is intended to obviate "mere technical abatements," see *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 314 (1964), held that, since respondent's conviction and sentence would remain intact even if he were released on parole, the purposes of 1 U. S. C. § 109 would not be served by applying it to save the no-parole provision of 26 U. S. C. § 7237 (d). 483 F. 2d, at 663; see *United States* v. *Stephens,* 449 F. 2d 103, 105–106 (1971). This analysis, it seems to us, begs the relevant question. The no-parole provision of 26 U. S. C. § 7237 (d) was directly incorporated into the sentencing provisions of 21 U. S. C. § 174 and 26 U. S. C. § 7237 (a), see n. 3, *supra,* and if the repeal of 26 U. S. C. § 7237 (d) can be viewed as mitigating respondent's punishment under those sections, his conviction and sen-

United States v. *Reisinger*, 128 U. S. 398 (1888), held that the saving clause's use of the words "penalty," "liability" and "forfeiture" required the conclusion that the clause covered criminal statutes. Those words, the Court found, were "used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment,' in connection with crimes of the highest grade." *Id.*, at 402. Thus, the Court agreed with the construction of the clause by Justice Miller, as Circuit Justice, in *United States* v. *Ulrici*, 28 Fed. Cas. 328, 329 (No. 16, 594 (1875)), that those terms "were used by congress to include all forms of punishment for crime." See 128 U. S., at 402–403. In consequence, the saving clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense. See, *e. g.*, *Jones* v. *United States*, 327 F. 2d 867 (1963); *United States* v. *Kirby*, 176 F. 2d 101 (1949); *Lovely* v. *United States*, 175 F. 2d 312 (1949).

Although the general saving clause does not ordinarily preserve discarded remedies or procedures, see *Hertz* v. *Woodman*, 218 U. S. 205, 218 (1910); *United States* v. *Obermeier*, 186 F. 2d 243, 253 (1950), the legislative history of § 7237 (d) reveals that Congress meant ineligibility for parole to be treated as part of the "punishment" for the narcotics offenses for which respondent was convicted. Section 7237 (d) was enacted as part of the Narcotic Control Act of 1956. The statute embodied congressional acceptance of the approach that effective combat against the contagion of drug addiction required the imposition of severe penalties for certain narcotics offenses. Congress therefore enacted lengthy mandatory

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tence would not be left intact by the repealer and his prosecution would "technically" abate under the common-law rule. Thus, the appropriate inquiry is whether parole ineligibility is a "penalty, forfeiture, or liability" for his offense that survives the repealer.

minimum sentences as a means of decreasing both drug addiction and trafficking. See, *e. g.*, S. Rep. No. 1997, 84th Cong., 2d Sess., 5 (1956), H. R. Rep. No. 2388, 84th Cong., 2d Sess., 10 (1956). But Congress believed that longer sentences would not achieve the desired results unless the offender remained imprisoned for his full term.

> "In evaluating the effectiveness of the presently prescribed penalties, it must be recognized that special incentives in our penal system serve to decrease the actual time spent in a penal institution under a sentence imposed by a court. The violator is eligible for parole after serving one-third of his sentence. . . . Available data from the Bureau of Prisons, indicates that a narcotics violator actually serves an average of less than two-thirds of the sentence imposed by the court. This mitigation of the sentence tends to defeat the purposes of [existing legislation] . . . ." H. R. Rep. No. 2388, *supra*, at 10–11.

Accordingly, Congress expressly provided in § 7237 (d) that parole under 18 U. S. C. § 4202 would be unavailable for narcotics offenders.

There are additional reasons for believing that the no-parole provision is an element of respondent's "punishment." First, only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. See *United States* v. *Ross*, 464 F. 2d 376, 379 (1972); *United States* v. *De Simone*, 468 F. 2d 1196, 1199 (1972). For the confined prisoner, parole—even with its legal constraints—is a long step toward regaining lost freedom.[12] An observation made in somewhat different context is apt:

> "It may be 'legislative grace' for Congress to provide for parole but when it expressly removes all

[12] In *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972), in determin-

> hope of parole upon conviction and sentence for certain offenses, . . . this is in the nature of an additional penalty." *Durant* v. *United States*, 410 F. 2d 689, 691 (1969).

Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause of Art. I, § 9 of the Constitution, of whether it imposed "a greater or more severe *punishment* than was prescribed by law at the time of the . . . offense," *Rooney* v. *North Dakota*, 196 U. S. 319, 325 (1905) (emphasis added). See *Love* v. *Fitzharris*, 460 F. 2d 382 (1972); cf. *Lindsey* v. *Washington*, 301 U. S. 397 (1937); *Holden* v. *Minnesota*, 137 U. S. 483, 491–492 (1890); *Calder* v. *Bull*, 3 U. S. (3 Dall.) 386, 390 (1798); *United States ex. rel. Umbenhowar* v. *McDonnell*, 11 F. Supp. 1014 (1934).

Thus, at least where, as in the case of respondent's narcotics offenses, Congress has barred parole eligibility as a punitive measure, we hold that the no-parole provision of § 7237 (d) is a "penalty, forfeiture, or liability" saved by § 109.

III

Respondent emphasizes that Congress completely changed its approach to regulation of narcotics offenses in the 1970 Act, jettisoning the retributive approach of the 1956 law in favor of emphasis in the 1970 Act upon re-

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ing that parole may not be revoked without affording the parolee procedural due process, we observed:

"The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with his family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison." (Footnote omitted.)

habilitation of the narcotics offender. He argues that, in light of this basic change, little purpose is served by denying respondent eligibility for parole, indeed that such denial frustrates the current congressional goal of rehabilitating narcotics offenders.

Undeniably this argument has force, but it is addressed to the wrong governmental branch. Punishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds. See *Gore* v. *United States*, 357 U. S. 386, 393 (1958); *Bell* v. *United States*, 349 U. S. 81, 82 (1955). Section 1103 (a) of the 1970 Act and 1 U. S. C. § 109 saved from repeal the bar of parole eligibility under § 7237 (d), and, however severe the consequences for respondent, Congress trespassed no constitutional limits.

The judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 73-831

Warden, Lewisburg Penitentiary, Petitioner, *v.* Benigno Marrero.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 19, 1974]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The Court holds that the no-parole provision of the repealed statute, 26 U. S. C. § 7237 (d) (1964 ed., Supp. V), is saved by both the general savings clause, 1 U. S. C. § 109, and the specific savings clause, § 1103 (a), of the 1970 Act. I believe that neither provision can be read to cover postsentencing parole eligibility and I therefore respectfully dissent.

I

Section 109. Parole eligibility, in my view, is not a "penalty" envisioned by, and within the meaning of, the general savings statute, 1 U. S. C. § 109. The purpose and thrust of § 109, the pertinent portion of which was enacted originally in 1871, 16 Stat. 432, is to preclude the technical abatement of a prosecution for an offense that was committed before the criminal statute was repealed. *Hamm* v. *Rock Hill*, 379 U. S. 306, 314 (1964). Quite appropriately, this recognizes that, apart from exceptional circumstances,[1] one who violates the criminal law should not escape sanction if, subsequent to the commission of his criminal act, the law happens to be repealed.

This savings statute, however, is not in line with the traditional common-law rule favoring application of

[1] See, *e. g.*, *Hamm* v. *Rock Hill*, 379 U. S. 306 (1964).

existing law. *United States* v. *Chambers*, 291 U. S. 217 (1934); *United States* v. *Tynen*, 11 Wall. 88 (1871). See *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801); *Bradley* v. *School Board of the City of Richmond*, — U. S. — (1974). The statute has never been applied by this Court other than to prevent technical abatement of a prosecution.[2] Those federal courts that have interpreted the statute's reference to "penalty" to include the terms of the sentence have dealt only with the length of the sentence actually imposed. *United States* v. *Kirby*, 176 F. 2d 101 (CA2 1949); *Lovely* v. *United States*, 175 F. 2d 312 (CA4), cert. denied, 338 U. S. 834 (1949); *Duffel* v. *United States*, 95 U. S. App. D. C. 242, 221 F. 2d 523 (1954); *Maceo* v. *United States*, 46 F. 2d 788 (CA5 1931).[3]

In this case, however, we are faced with a decidedly different situation. Respondent Marrero in no way is seeking to avoid punishment for his criminal act, and he is still fully subject to the service of his sentence. What

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[2] The issue certified and decided in *United States* v. *Reisinger*, 128 U. S. 398 (1888), was only whether a prosecution under a repealed criminal statute survived the repeal. "Penalty" appears to have been used there interchangeably with the concept of criminal liability. See also *United States* v. *Smith*, 433 F. 2d 341 (CA4 1970), cert. denied, 401 U. S. 942 (1971); *United States* v. *Brown*, 429 F. 2d 566 (CA5 1970); *Faubion* v. *United States*, 424 F. 2d 437 (CA10 1970).

[3] In *Kirby* and *Lovely* the courts of appeals construed the general savings clause in connection with repealing statutes' savings clauses that provided for the nonabatement of any "rights and liabilities" under the repealed acts. It is interesting to note that all the cases cited by the Court, *ante*, p. 8, and the Government, Brief for Petitioner 16–17, for the proposition that sentence as well as prosecution survives under the general savings clause, were decided in circuits that subsequently rejected the extension sought by the Government in the present case.

Marrero seeks is merely the opportunity to be *considered* for parole. Eligibility for parole will not free him from his imposed sentence. The decision whether he should be accorded parole lies within the discretion of the Board of Parole. If for any reason the Board feels that parole would not be appropriate for the respondent, it can be denied, and Marrero will remain incarcerated for the term to which he is subject. Moreover, even if parole is deemed appropriate and is granted, respondent still would be subject to the conditions the parole authorities choose to place on his conditional freedom.

As the Fourth Circuit aptly has observed, parole "is not a release of the prisoner from all disciplinary restraints, but is rather merely 'an extension of the prison walls'; and the prisoner while on parole remains 'in the legal custody and under the control of' the Parole Board," *United States ex rel. Rowe* v. *Nicholson*, 78 F. 2d 468, 469–470, cert. denied, 296 U. S. 573 (1935); *Alvarado* v. *McLaughlin*, 486 F. 2d 541, 544 (1973). See also *Marshall* v. *United States*, — U. S. App. D. C. —, 485 F. 2d 1062, 1065 (1973). The "sentence" to be served by respondent is still 10 years, whether or not he is granted parole. Cf. *Anderson* v. *Corall*, 263 U. S. 193 (1923). In short, it is by no means clear to me that respondent Marrero is seeking to be relieved of the obligations of the "sentence" imposed upon him.

By expanding the term "penalty" to include parole eligibility, rather than restricting it to the sentence imposed, the Court, in my view, misconceives the nature of parole ineligibility and extends § 109 well beyond its prior limits. To say that Congress intended parole ineligibility to be a "penalty" under the repealed statute is merely to state the conclusion. The appropriate question is whether Congress intended parole ineligibility to be the

type of "penalty" preserved by the general savings statute. Until today, § 109 has not been read so broadly, and I believe this extension goes beyond the intended narrow anti-abatement reach of § 109. To repeat: § 109 "was meant to obviate mere technical abatement." *Hamm* v. *Rock Hill,* 379 U. S., at 314.

This unprecedented extension of § 109 might be justified, and perhaps made acceptable, if it were possible in any way to conclude that the Court's reading serves to effectuate congressional intent or to promote some valid policy. But the result reached clearly does a disservice in both respects.

As is demonstrated in Part II, *infra,* Congress did not affirmatively intend to save the no-parole provision. And on pure policy grounds, the result reached by the Court is wholly illogical. Presumably, the purposes behind parole ineligibility are to effect a deterrence to the commission of narcotics offenses, and to keep serious drug offenders behind bars for longer periods. By repealing the parole ineligibility provision, Congress rejected any deterrence rationale that had existed. A person who, on or subsequent to May 1, 1971, might anticipate the commission of a drug offense and who is cognizant of the law, knows that he is eligible for parole under 18 U. S. C. § 4202 after service of one-third of his more-than-180-days sentence. The anomalous effect of the Court's action is that it keeps an inmate who is convicted of an offense committed on April 30, 1971, incarcerated for the full length of his term, while his fellow inmate who committed the identical crime on May 2 and who behaved identically in prison, is eligible for release after one-third the time. Surely, disparate treatment of this kind serves only to frustrate the inmate's sense of justice

and to undermine whatever rehabilitative attempts currently are being made.[4]

II

Section 1103 (a). In passing the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236, with its specific repealer provisions in §§ 1101 (b)(3)(A) and (b)(4)(A), Congress unequivocally withdrew and rejected the concept of parole ineligibility. It concluded that the criminal process is ill served by a law that removes the incentives and the rehabilitative potential of a parole system. The only reference in the 1970 Act to pre-Act offenders is in the savings provision of § 1103 (a), 84 Stat. 1294, and it precludes abatement only of "prosecutions." Although we pretermitted this precise question in *Bradley* v. *United States*, 410 U. S. 605, 611 n. 6 (1973), the Court clearly distinguished postsentence parole eligibility from the specific terms of the sentence already handed down. I believe this distinction is crucial and that it requires a different result in the instant situation.

In determining whether § 1103(a) bars parole eligibility for pre-Act offenders, the Court should ascertain what Congress intended. While there is no precise legislative history on this question, I think the wording of § 1103(a) and the overall purposes of the 1970 Act preclude the result reached by the Court. Section 1103(a) applies only

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[4] The Solicitor General concedes that granting parole eligibility presents no institutional problems.

"Neither the Bureau of Prisons nor the Board of Parole believes that it would impede the proper performance of their functions if they were required to consider narcotics offenders convicted under the prior statute eligible for parole under 18 U. S. C. § 4202. Such a requirement would not demand the granting of parole to any individual prisoner unless the Board determines that his supervised release from confinement is in the interests of both the prisoner and society." Brief for Petitioner 8.

to "prosecutions." We reached the outer limit of this term in *Bradley*. Certainly the legislative and judicial history of the even broader language of the general savings provision, § 109, hardly supports the extravagant interpretation of § 1103 (a) reached today. In light of the clear history and law under § 109, had Congress wanted to save more than the prosecution itself, it could well have done so in specific terms. Instead, it chose the narrowest possible savings clause. Particularly in light of the fact that the text of the 1970 Act specifically rejects the concept of paroleless sentencing, it is illogical and unwarranted to assume that Congress intended the term "prosecutions" to be read so broadly.

For me there is no ambiguity in § 1103 (a). I would take the limited savings clause at its word. Assuming, *arguendo*, that there is some doubt as to the congressional intent, it is harsh, to say the least, to resolve the doubt in the manner chosen by the Court. In light of the general rule favoring application of existing law, *United States* v. *Chambers*, 291 U. S. 217 (1934), and the general rule favoring construction of ambiguous statutes in favor of criminal defendants, *United States* v. *Bass*, 404 U. S. 336 (1971), I see no other choice than to resolve any doubts in favor of eligibility.

The Court would justify its broad reading of the word "prosecution" by stating that "a pragmatic view of sentencing requires [this] conclusion." *Ante*, p. 5. Needless to say, no authority, legal or otherwise, is cited for this proposition other than the majority's own intuition, and I venture to say that none could be cited. Parole eligibility is determined by a parole board at *its* discretion, and the existence of parole eligibility is either guaranteed by statute or, as in the case of the repealed Act, is denied by statute. One thing is clear: the sentencing judge has no explicit control over the determination. Congress has never instructed district courts to assess sen-

tences according to parole eligibility dates and if in fact some judges do this, it hardly justifies this Court's flat conclusion that parole eligibility is "implicit in the terms of the sentence" and is "thus determined at the time of sentencing." *Ibid.*

Whatever else *Bradley* held, it clearly stated that the parole eligibility determination under 18 U. S. C. § 4202 (as opposed to preclusion of early parole in the terms of the sentence, as in *Bradley*) does not lie with the District Judge, and the determination is "*made long after sentence has been entered and the prosecution terminated.*" 410 U. S., at 611 n. 6.[5] Even assuming n. 6 in *Bradley* did not conclusively decide the instant issue, the Court's opinion renders the words of the footnote a nullity. The majority states that we "could not reasonably be thought to have decided in a footnote a question 'on which' we said in the text, 'we express no opinion,'" *ante*, p. 5. It then goes on to decide that very issue, relying almost entirely on *Bradley* and concluding that "under the teaching of *Bradley*" ineligibility for parole is part of the 'prosecution.'" At the least, *Bradley* precludes the approach taken by the majority. To my mind, it precludes the result reached.

III

Respondent Marrero does not seek release. He seeks only to be treated in the manner Congress now has recognized as appropriate for all criminal offenders, including those convicted of narcotics violations. If a professional

[5] As the Court notes in n. 9, *ante*, p. 6, in *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972), we stated that "[p]arole arises after the end of the criminal prosecution, including imposition of the sentence." The fact that the decision might have dealt with release rather than the determination of eligibility does not eliminate the conceptual proposition that parole eligibility is an event separate from sentencing, and I feel that the majority's attempted distinction is not persuasive.

Board of Parole determines that parole is in the best interests of an inmate and of society, Congress has determined that the inmate should be paroled. The Court, in my view, makes a serious mistake in expanding § 109 so drastically, and in interpreting § 1103 (a) contrary to its intent and language, in order to preclude this result. With only one exception,[6] the federal courts of appeals that have considered this issue currently reject the Government's argument.[7] Inasmuch as I believe the Government's position here is incorrect, in terms both of the laws and of policy, I would affirm the judgment of the Court of Appeals.

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[6] *Perea* v. *United States Board of Parole*, 480 F. 2d 608 (CA10 1973).

[7] *United States ex. rel. Marrero* v. *Warden*, 483 F. 2d 656 (CA3 1973); *Alvarado* v. *McLaughlin*, 486 F. 2d 541 (CA4 1973); petition for certiorari pending *sub nom. McLaughlin* v. *Prieto*; *Amaya* v. *United States Board of Parole*, 486 F. 2d 940 (CA5 1973), petition for certiorari pending; *United States* v. *Marshall*, — U. S. App. D. C. —, 485 F. 2d 1062, 1065 (1973). See *United States* v. *Huguet*, 481 F. 2d 888 (CA2 1973) (question pretermitted). See also *United States* v. *McGarr*, 461 F. 2d 1, 4 (CA7 1972); *United States* v. *Stephens*, 449 F. 2d 103 (CA9 1971). The Second Circuit's earlier decision in *United States* v. *De Simone*, 468 F. 2d 1196 (1972), cert. denied, 410 U. S. 989 (1973), cited by the Court in its n. 7, *ante*, p. 3, was referred to in *Huguet*, and "cannot be regarded as controlling." 481 F. 2d, at 891.